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ABSTRACT

The purpose of this report is to raise some of the major challenges to press freedom, full public information, and media responsibility. It consists of several papers presented at a symposium held in Wisconsin in May 1972 dealing with freedom of the press particularly from the perspectives of journalism and law. The first paper discusses constitutional guarantees, accommodations between freedom and permissible restraint, the ever changing patterns and needs of society and the growth of law, and journalistic self-restraint as an alternative to governmental restraint. The second paper reviews Supreme Court decisions on issues of libel and privacy and asks what remains of the rights to reputation and privacy. Five causes for concern about press freedom are presented and discussed in the last paper: neglect by the nation's best minds of responsibilities toward general citizenship, abuse by public officials of democracy's basic precept that government derives from and exists for the public, mass citizen indifference to restraints being put upon press freedom, the changing character of print media ownership, and attacks on the principal practitioners of press freedom by the Nixon administration and its emulators. (SH)

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The Future Of Press Freedom:

Journalism And Law Perspectives

A Wingspread Symposium to discuss conflicting views of the status of First Amendment press freedoms as our democratic society enters the final third of the twentieth century and approaches the bicentennial of its founding as a nation.

convened by

Department of Journalism and Mass Communication

THE UNIVERSITY OF WISCONSIN-EXTENSION

in cooperation with

THE JOHNSON FOUNDATION

May, 1972

THE FUTURE OF PRESS FREEDOM: JOURNALISM AND LAW PERSPECTIVES

Introduction to the Symposium

The Wingspread Symposium on "The Future of Press Freedom: Journalism and Law Perspectives," held in May 1972, was the third in a series of conferences held at Wingspread which brought together professional journalists, journalism educators, and other opinion leaders to explore in formal presentations and in open discussion significant issues affecting the press in our time . . . and with a focus on Wisconsin.

The first conference, held in March 1970, was planned by University of Wisconsin-Extension and the Wisconsin Associated Press Association, in cooperation with The Johnson Foundation, and was entitled "Wingspread Conference on Journalism: The Newsroom and the Classroom."

The second, held in March 1972, was a joint conference of the Wisconsin Broadcasters Association and the University of Wisconsin-Milwaukee, in cooperation with The Johnson Foundation. Entitled "The Broadcaster-Educator and Professional Practitioner," this conference also considered education and the professional field of broadcast journalism, bringing together Wisconsin journalism and communication teachers and professionals from radio and television stations in the state.

The increase in attempts at news management by government, the publication of the Pentagon Papers, and the growing concern of journalists and educators for the apparent erosion of public confidence in the institutions of government, education, and the press suggested that it might be productive to bring together a group of scholars and other opinion leaders for an exploration of the future and present condition of The First Amendment.

The questions which continue to arise are: Who is the primary advocate for the common man -- his elected representatives (the Government), the Courts, or the Press? How can they best function to advance the public interest? When government, the courts, and the press are in conflict, which has precedence?

The topic for this symposium therefore is freedom of the press, with particular attention to the perspectives of journalism and law.

At the Wingspread Symposium on "The Future of Press Freedom: Journalism and Law Perspectives" papers were presented by Professor David Fellman, Vilas Professor of Political Science at The University of Wisconsin-Madison; Professor Donald Gillmor, Professor of Journalism and Mass Communication at The University of Minnesota-Minneapolis; and Mr. Arville Schaleben, retired associate editor of The Milwaukee Journal.

Following the formal presentation, a session was moderated by Professor Harold Nelson, Director, School of Journalism and Mass Communication at The University of Wisconsin-Madison. The session opened with remarks by members of a panel and concluded with a plenary session of open discussion.

It is our hope that this report will raise some of the major challenges to press freedom, full public information, and media responsibility and hopefully will stimulate persons to act, each in his own sphere of influence, to further the principles and the practice of press freedom, in the public interest.

-- *James A. Fosdick*
Professor of Journalism
Chairman, University of Wisconsin
Extension Department of Journalism
and Mass Communication

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"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

-- First Amendment
Constitution of the United States

THE FUTURE OF PRESS FREEDOM: JOURNALISM AND LAW PERSPECTIVES

Speakers at the Plenary Session and their Topics:

"Freedom of the Press in American Constitutional Law"

DAVID FELLMAN
Vilas Professor of Political Science
University of Wisconsin-Madison

"The Residual Rights of Reputation and Privacy"

DONALD N. GILLMOR
Professor of Journalism and
Mass Communication
University of Minnesota-Minneapolis

"Press Freedom: Can It Survive The Seventies?"

ARVILLE O. SCHALEBEN
Retired Associate Editor
The Milwaukee Journal

Moderator

JAMES A. FOSDICK
Chairman, Department of Journalism
and Mass Communication
University of Wisconsin-Extension

Discussants at the Second Plenary Session on "PRESS FREEDOM PERSPECTIVES:"

JAMES P. BRODY
Attorney
Foley & Lardner
Milwaukee

VERNE A. HOFFMAN
Editor
The Journal-Times

GILBERT H. KOENIG
Editor
Waukesha Freeman
Waukesha

EDWARD NAGER
State Representative
Madison

JAY G. SYKES
Professor of Mass Communication
University of Wisconsin-Milwaukee

Moderator

HAROLD L. NELSON
Director
School of Journalism and Mass
Communication
University of Wisconsin-Madison

FREEDOM OF THE PRESS IN AMERICAN CONSTITUTIONAL LAW

by

David Fellman

I

There are four broad propositions concerning the meaning of freedom of the press in American constitutional law which ought to be stated at the very outset. The first is that while the First Amendment guaranty of freedom of the press is a limitation only upon the powers of the national government, and does not apply to the states, the Supreme Court regards the guaranty of freedom of the press to be so indispensable for our system of government that it has read it into the liberty part of the Due Process Clause of the Fourteenth Amendment.[1] Citing some previous free speech cases, Chief Justice Hughes said, in 1931, in the opinion which first enunciated this doctrine: "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the 14th Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property."[2]

The second general proposition is that the Supreme Court, in interpreting the First Amendment, is committed to the position that the constitutional right to freedom of speech and press is not a flabby one which protects only utterances and publications which are safe and comfortable for everyone. On the contrary, the Court has declared that we have "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[3] As Justice Douglas once said in an important free speech case, "The vitality of civil and political institutions in our society depends on free discussion . . . Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptances of an idea," and there can be no censorship or punishment of speech "unless shown likely to produce a clear and present danger of a serious substative evil that rises far above public inconvenience, annoyance, or unrest . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."[4]

The third broad proposition is that while freedom of speech and the press is of vital importance to our political life style, like all other freedoms, it is not absolute or unlimited. While there is general agreement with Justice Brandeis's famous remark that "discussion affords ordinarily adequate protection against the dissemination of noxious doctrine," even that staunch

defender of freedom of speech declared, in the same opinion, that "although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral."[5] As Justice Murphy, an equally enthusiastic defender of free speech, once declared, "it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[6] Thus, in a case upholding the withdrawal of second-class mailing privileges from a newspaper which was found to be in violation of the Espionage Act of 1917, Justice Clarke declared that "freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to protection of him who counsels and encourages the violation of the law as it exists. The Constitution was adopted to preserve our government, not to serve as a protecting screen for those who, while claiming its privileges, seek to destroy it."[7]

Finally, it is important to note that the constitutional guaranty of a free press does not immunize the press from the operation of general regulatory laws not aimed at the press as such. In holding that the Associated Press was subject to the Wagner Act even as regards its editorial employees, the Court observed that "the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and nondiscriminatory taxes on his business."[8] Accordingly, the Court ruled that a Labor Board order directing the reinstatement of an editorial employee because he had been dismissed for a reason which the Act declares to be an impermissible unfair labor practice does not interfere with the liberty of the publisher to publish the news as desired.

Similarly, a few years later, in another case involving the Associated Press, the Supreme Court ruled that the First Amendment does not immunize the press from the anti-trust laws.[9] "Freedom to publish is guaranteed by the Constitution," said Justice Black, "but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[10] Futhermore, if Congress can compel publishers to bargain collectively with their employees, and to obey the anti-trust laws,

then it follows, as the Court has held, that Congress may also require publishers to obey the Fair Labor Standards Act, for to insist that publishers observe the same minimum standards relating to hours of labor and wages of employees which apply to all other employers does not violate the free press guaranty.[11]

II

The most important right of a free press must be the very right to publish. The freedom to publish means, as a bare minimum, that the publisher cannot be required to get the permission of the government to publish, and that the government cannot lawfully forbid publication, whatever consequences may follow later on after the publication appears. This proposition, that previous governmental restraint on publication is a form of censorship which is forbidden by the constitutional guaranty of a free press, was nailed down in 1931 by the Supreme Court in the leading case of Near v. Minnesota.[12] In 1925 the state legislature enacted a statute which authorized the abatement by the courts, on petition of a state's attorney, as a public nuisance, of any "malicious, scandalous, and defamatory newspaper, magazine, or other periodical." Near published a Saturday paper in Minneapolis which specialized in making scurrilous attacks upon the police chief, the mayor and other local officials. Dividing 5-4, the Supreme Court held that since the statute was directed at continued publication, and since its object was not punishment, in the ordinary sense of the term, but rather suppression of the newspaper, it constituted an "effective censorship." This sort of prior restraint, the Court ruled, was the very thing the constitutional guaranty of a free press was intended to prevent. The preliminary freedom to publish, it was noted, extends to false news as well as to the true. Ample protection for wrongs committed is afforded by the law of libel. Chief Justice Hughes pointed out, however, that restraint on previous publication might be sustainable in extraordinary situations, such as those involving war, obscenity, incitement of violence against the government, or the protection of individuals from words having the effect of force. Furthermore, he conceded that while charges of official malfeasance unquestionably create a public scandal, "the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication."[13] The four dissenting Justices maintained that the statute did not impose previous restraint, but merely denounced things done as a nuisance. They also argued that the police power of the state is sufficiently broad to prevent, in the preservation of peace and good order, such abuses of the liberty of the press as were found in this case.

The other case in which the Supreme Court nailed down the concept of the freedom of the press from previous restraint was the 1971 decision involving the so-called "Pentagon Papers."[14] This decision grew out of an attempt of the Attorney General of the United States to enjoin the New York Times and the Washington Post from publishing the contents of a classified

study on the "History of U.S. Decision-Making Process on Viet Nam Policy." Dividing 6-3, the Court explained, in a very brief per curiam opinion, that since any system of prior restraint comes to it bearing a heavy presumption against its constitutional validity, the government bears a heavy burden of proof, and it ruled that the government had not met that burden. But in addition each Justice wrote his own opinion. Justices Black, Douglas and Brennan argued that the Constitution stands as an absolute bar to any such previous restraint. Justice Black declared that to hold that a newspaper may sometimes be enjoined would make a shambles of the First Amendment. Justices Stewart, White and Marshall, however, though concurring in the judgment of the Court, were unwilling to say that an injunction against publication could never be permitted. Justice Stewart suggested that in the fields of national defense and international diplomacy there may be a case for confidentiality and secrecy, and he said that he did not believe that publication of these papers would result in direct, immediate and irreparable damage to the nation. All three of these concurring Justices stressed the fact that there was no statute authorizing the injunction. Justice Marshall argued that the Court cannot permit the doing of something which Congress has specifically refused to do without violating the principle of the separation of powers. Chief Justice Burger and Justices Harlan and Blackmun dissented, not on the merits, but on the ground that the Court dealt in unseemly haste with an inadequate record, and accordingly they favored a remand to the district court for a proper trial of the facts. Justice Harlan reviewed what he called the "frenzied train of events," and concluded that the majority of the Court had been "almost irresponsibly feverish" in dealing with the case. Justice Blackmun protested that this was no way to try a lawsuit.

Thus, only three Justices, one of whom is now dead, were committed to the proposition that all injunctions against publication are unlawful; three Justices reserved judgment on this point, and it is a fair guess that the three dissenters would probably go along with them. Futhermore, the Court did not rule on the validity of the government's classification system, and indeed, it may be inferred from the total absence of discussion on the point that classification of government documents is not illegal per se. Presumably the government will understand, the next time, that is must carry a heavy burden of proof to overcome the legal presumption against previous restraint, and the possibility that it might satisfy the Court with very convincing evidence should not be ruled out.

One famous attempt to burden the right to publish through the taxing power was struck down by a unanimous Court in 1936.[15] In 1934 the Legislature of Louisiana, then under the domination of Huey Long, imposed a 2% tax on the gross receipts of all newspapers and periodicals having a circulation of over 20,000 copies a week. Labelled a license tax, it affected 13 of the 17 daily newspapers in the state, but did not touch any of the 120 weekly papers, most of which were friendly to Huey Long. The tax was aimed at the city papers which were unfriendly. Reviewing the "well-known and odious" history of "taxes on knowledge," Justice Sutherland, speaking for the Court, ruled the tax unconstitutional as a form of impermissible newspaper

licensing. He quoted with approval the observation once made by Judge Cooley that the evils to be prevented by the First Amendment "were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."[16] Of course newspapers are not immune from ordinary taxes, but, said Justice Sutherland, "this is not an ordinary form of tax, but one single in kind, with a long history of misues against the freedom of the press . . . The tax here involved is bad not because it takes money from the pockets of the appellees . . . It is bad because, in the light of its history and its present setting, it is seen to be a deliberate anc calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."[17]

A more recent case which upheld the right to publish was Mills v. Alabama,[18] decided in 1966. The Alabama Legislature had written into its Corrupt Practices Act a provision making it a crime "to do any electioneering or to solicit any votes . . . in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held." On November 2, 1962, there was an election in Birmingham in which the people were to decide whether they preferred to keep their existing commission form of government or replace it with a mayor-council system. Mills, the editor of the Birmingham Post-Herald, published an editorial on election day strongly urging the people to adopt the mayor-council system. Overruling the Alabama Supreme Court, the United States Supreme Court held the statute to be an "obvious and flagrant abridgement" of the liberty secured by the First Amendment, which is designed "to protect the free discussion of governmental affairs." The statute, the Court held, silences the press at the very time that it can be most effective, and noted that last-minute charges or claims could only be answered on election day.

The commitment of the Court to the right to publish was strikingly asserted in 1948, in a case involving Philip Murray, then president of the C.I.O.[19] One section of the Taft-Hartley Act of 1947 made it unlawful for any labor organization to make a contribution or expenditure in connection with any presidential or congressional election. In a deliberate attempt to test the validity of this provision, Murray published a statement in The C.I.O. News, a weekly newspaper owned by the union, urging all of its members to vote for a certain candidate for Congress in a Maryland district. The district court dismissed the indictment brought against Murray on the ground that it violated the First Amendment, and the Supreme Court affirmed by a unanimous vote. But a bare majority of the Court was content merely to rule that that statute was not intended to bar a newspaper from expressing views on candidates or political proposals in the regular course of its publication, thus

avoiding any ruling on the constitutional issue. They did say, however, that if the statute did forbid the union to advise its members on elections in its publications, then they would have "the gravest doubts" about its constitutionality. Four concurring Justices took the position that the Court avoided ruling on the constitutional issue only through an invasion of the legislative function by rewriting or emasculating the statute. They preferred a direct ruling that the statute was unconstitutional as an attempt "to force unions as such entirely out of political life and activity." "The expression of bloc sentiment," said Justice Rutledge, "is and always has been an integral part of our democratic electoral and legislative processes. They could hardly go on without it."[20]

Finally, in Time, Inc. v. Hill,[21] decided in 1967, a closely-divided Court put the right to publish ahead of a very appealing claim to the right of privacy. A suit for damages was brought in a New York state court, under a statute protecting the right of privacy, on the allegation that an article in Life Magazine falsely reported that a new play, "The Desperate Hours," portrayed an experience suffered by Hill and his family when held hostage by escaped convicts in Hill's home. The main issue turned on the fact that the story alleged violence against the family and sexual insult of the daughter, when in fact there had been no violence at all. The trial court failed to instruct the jury that a verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the article. A bare majority of the Supreme Court set aside a generous verdict. "We hold," said Justice Brennan, "that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."[22] It was noted that the guarantees of speech and press are not limited to political expressions or comments on public affairs. Futhermore, the Court held that it was improper to impose on newspapers, and the press generally, the impossible burden of verifying to a certainty all facts which appear in articles. Even negligence imposes an impossible test, since the publisher would have to guess how a jury might assess the reasonableness of attempts taken to verify the accuracy of every reference. To permit sanctions against either innocent or negligent misstatement would present the grave hazard of discouraging the press from exercising its constitutional guaranty; fear of large verdicts in damage suits for innocent or mere negligent misstatement would damage the freedom of the press. However, the constitutional guaranty can tolerate sanctions against calculated falsehood. Concurring separately, Justice Black and Douglas argued that to permit liability even for "knowing or reckless falsity" is to require publications to live with an elusive test which gives the jury unfettered discretion. Furthermore, Justice Douglas argued that a person's privacy normally ceases when his life has ceased to be private; once a story is in the public domain, there is no right of privacy. Four dissenting Justices thought that privacy is a basic right which states may vindicate, if they so choose, in this manner.

III

The contempt power is the judge's principal weapon for the protection of the integrity of court proceedings from the pressures of the newspapers. It is generally agreed that a judge may summarily commit to jail for contempt anyone who creates a disturbance in the physical presence of the court which directly interferes with the administration of justice. Much more debatable is the authority of the judge to punish for out-of-court contempts, and contempt by newspapers is invariably out-of-court. Since 1831, a federal statute forbids summary punishment unless the misbehavior was in the presence of the court, "or so near thereto as to obstruct the administration of justice."[23] The Supreme Court has always taken the position that a court may punish through the contempt power those who obstruct its processes. As Chief Justice White noted in 1918, courts have "the sacred obligation . . . to preserve their right to discharge their duties free from unlawful and unworthy influences and, in doing so, if needs be, to clear from the pathway leading to the performance of this great duty all unwarranted attempts to pervert, obstruct, or distort judgment."[24] He flatly denied that "the freedom of the press is the freedom to do wrong with impunity, and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends."[25] Thus in the early cases the Supreme Court attached great, if not decisive, weight to the decisions made by the judges, whether the contempt occurred at the state[26] or federal[27] level of justice.

In the 1940's, however, the Court began to take a closer look at the exercise of contempt powers by judges in cases involving press comment on pending cases by ruling that the power to punish must be reconciled with the requirements of a free press. More specifically, the Court ruled for the first time, in 1941, that the imposition of penalties for out-of-court publications is to be governed by the clear and present danger standard. The case involved the Los Angeles Times, which had published editorials, after conviction of several trade unionists, but before sentencing, in which it stated that the judge would make a serious mistake if he decided upon probation for what were referred to as gorillas. A fine for contempt of court was set aside, Justice Black applying the clear and present danger test, described succinctly as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[28] Furthermore, Justice Black pointed out that the constitutional right of freedom of speech and the press extends to publications dealing with judicial proceedings pending in the courts, and noted that public interest is necessarily at its highest peak while a proceeding involving a labor dispute is still pending. Said Justice Black: "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the

name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."[29] More specifically, the Court ruled that in view of the newspaper's long-continued militancy in the labor field, it was inconceivable that a judge in Los Angeles would expect anything but adverse criticism if he granted probation. Thus, to impute a threat to the court in this case "would be to impute to judges a lack of firmness, wisdom, or honor--which we cannot accept as a major premise."[30] Four dissenting Justices, speaking through Justice Frankfurter, accused the Court of giving constitutional sanctity to "trial by newspapers." A trial, Justice Frankfurter declared, is not a "free trade in ideas," and a court is "a forum with strictly defined limits for discussion." The contempt power, he insisted, is not designed to protect judges as the annointed priests of some mystical entity, but to protect the public and litigants from the dangers of a coerced tribunal. In their context, he thought the editorials could have had an intimidating effect upon the court.

In 1946 the Court was unanimous in overruling a contempt conviction of the associate editor of the Miami Herald, who had published several editorials sharply critical of how a judge had quashed several criminal indictments as being defective.[31] Actually the newspaper did not tell the whole truth, since reindictments were promptly secured. Justice Reed maintained that the press need not always wait until litigation is completely terminated before discussing the case. Short of creating a clear and present danger to the fair and orderly administration of justice, discussion of the problems of society must be free, and in borderline cases, the specific freedom of public comment should weigh heavily. Of course, comment may affect judges differently, but the law deals in generalities, and cannot be adjusted to every possible degree of moral courage and stability which judges may have. In a separate concurring opinion, Justice Frankfurter described this case as one of "judicial hypersensitiveness," but in another concurrence Justice Murphy went far beyond this position to assert that freedom of speech includes the right "to criticize and disparage, even though the terms be vitriolic, scurrilous or erroneous,"[32] even in the case of judges. In another concurring opinion, Justice Rutledge made the point that a requirement of strict accuracy in reporting legal news would be an impossible one, since most newspapermen are not lawyers and the law is full of perplexities. "There must be," he insisted, "some room for misstatement of fact, as well as for misjudgment, if the press and others are to function as critical agencies in our democracy concerning courts as for all other instruments of government."[33]

Finally, in a third decision rendered the following year, the Supreme Court set aside a conviction by a Texas judge of several newsmen working for a newspaper in Corpus Christi who had been very critical of how the judge had handled a forcible detainer case involving a landlord and a tenant then serving in the army.[34] The news stories and editorial which triggered the wrath of the judge indulged in some very extreme language which described the court's

decision as "arbitrary action," "a travesty on justice," "a gross miscarriage of justice," and "a raw deal." They declared that a fair hearing had been denied, and that the judge had brought down on his head "the wrath of public opinion." The judge meted out three-day sentences on the ground that the stories and editorials were false, and designed to influence him to grant a motion for a new trial. Speaking for the Court, Justice Douglas stressed that a trial is a public event which can be reported with impunity, and while he conceded that the news stories did not reflect good reporting, he noted that "inaccuracies in reporting are commonplace. Certainly a reporter could not be laid by the heels for contempt because he missed the essential point in a trial or failed to summarize the issues to accord with the views of the judge who sat on the case." Furthermore, he could not see how the stories created any imminent or serious threat "to a judge of reasonable fortitude." While the language of the editorial was strong, intemperate, even unfair, this is not enough to warrant punishment. "The danger must not be remote or even probable; it must immediately imperil." The law of contempt, Justice Douglas added, "is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate."[35]

The issue in this sort of case was well drawn by the three dissenting Justices. Justice Frankfurter emphasized that freedom of the press presupposes an independent judiciary which, when occasion demands, will protect that freedom. He also argued that a federal court should not overrule state courts, which are much closer to the basic facts, unless there is no basis in reason for their conclusion. Justice Jackson conceded that a free press is a vital right, but so also is the right "to have a calm and fair trial." It is wrong, he insisted, to tell the press that it may be irresponsible because the judges have so much fortitude. "I do not know," he wrote, "whether it is the view of the Court that a judge must be thick-skinned or just thickheaded, but nothing in my experience or observation confirms the idea that he is insensitive to publicity."[36] Most state judges, he noted, are elected for short terms, and the ambition of a judge to remain in office is neither unusual nor dishonorable.

IV

Closely related to the contempt problem is that of pre-trial publicity in the press, the difference being that in contempt cases the newsmen go to jail, whereas in cases of excessive pre-trial publicity the defendant goes free or secures a new trial. As in the contempt cases, the question is whether pretrial publicity was so massive and pervasive as to preclude the possibility of a fair trial. The United States Supreme Court first reversed a state conviction because of pretrial publicity in 1961, in Irvin v. Dowd.[37]

Irvin had been accused of six murders, and in an atmosphere of great community excitement and indignation, the local press publicized extensively a confession released by the police to the newsmen. He was granted a change of venue to an adjoining county, but was denied a second change of venue. So heated was the atmosphere that it took four weeks to select a jury; 268 persons had to be excused because they had fixed opinions of guilt, and eight of the twelve jurors who were finally selected admitted that they thought the accused was guilty, but denied having fixed opinions on the subject. The Supreme Court, by unanimous vote, set aside the conviction as a denial of due process, which, as a bare minimum, requires a fair trial before impartial jurors. The Court concluded that because of the barrage of newspaper headlines, articles, pictures and cartoons in newspapers reaching 95% of the homes in the county, including announcement of the confession, and the massive radio and television coverage, the build up of prejudice had been clear and convincing. "With his life at stake," said Justice Clark, "it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt."[38] Justice Frankfurter wrote a concurring opinion to explain that what happened here was not an isolated or atypical case, and to deplore trial by newspaper.

Two years later, the Court set aside a conviction for a kidnapping and murder on the ground that it was prejudicial error to refuse a change of venue where a local television station broadcast three times a confession made to the sheriff by the accused.[39] At the same time, in the case involving the conviction of the West coast labor union official, Dave Beck, for embezzlement of union funds, the Court refused to set aside the verdict because the news media in the vicintiy had circulated a large amount of adverse publicity.[40] It was noted that the trial took place nine and a half months after the first publicity appeared, that both grand and petit jurors had been carefully examined, and that all who admitted prejudice were promptly eliminated by the judge.

The moral is that the right to a fair trial is not defeated merely because there has been a great amount of pretrial publicity, and how much publicity is too much in the constitutional sense is a matter of judgment for the appellate judges. Thus, to cite but one well-known example, in the case of Dr. Sheppard the Court concluded that the newspaper, radio and television publicity before and during trial had been so massive and pervasive as to deprive the accused of a fair trial.[41] The Court emphasized that it was well within the power of the judge to control the news media -- e.g. the release of prejudicial matters to the press -- and that he has a duty to exert control over the total trial situation, whether or not he was requested to do so by counsel, to protect the accused from the inherently

prejudicial publicity which had saturated the community. Similarly, in the case of Billie Sol Estes, a conviction for the offense of swindling was set aside because the preliminary hearing, and portions of the trial, were broadcast by television over objections of the defendant.[42] The Court was concerned about many threats to a fair trial because of the possible though perhaps incalculable impact of television upon jurors, witnesses, the judge and the defendant. It was stressed that a case must be decided by evidence and argument in open court, and not by outside influences.

While an occasional reversal by the Supreme Court serves as notice to local courts to try to avoid or reduce the amount of prejudicial pretrial publicity, it is very doubtful whether reversals and contempt citations are adequate guarantees of fair trials. The country is deeply committed to a free press, and elective judges are understandably reluctant to offend newsmen. Furthermore, it is highly desirable that the community should be adequately informed about events of public importance. It follows that much depends upon voluntary self-restraint through adherence to codes of professional behavior. Thus the American Bar Association adopted the Reardon Report in 1968, which provides that no information should be released or published before the end of the trial regarding prior criminal records, confessions, identity of prospective witnesses, or speculation or opinion regarding possible guilt or innocence. For lawyers, it was suggested, the sanction could be disciplinary proceedings based on the ABA Canons of Professional Ethics; for law enforcement officers the sanctions could take the form of internal rules and regulations; and for newspapers the sanction would lie in the contempt power. Those who back away from imposing direct controls on the news media prefer the use of voluntary codes only. On April 7, 1970, eight national organizations -- the American Bar Association, the American Society of Newspaper Editors, the Radio-Television News Directors Association, the National Association of Broadcasters, the Associated Press Managing Editors Association, the Conference of Chief Justices, the National Conference of State Trial Judges, and the National District Attorneys Association -- joined in a statement which expressed respect for "the co-equal rights of a free press and a fair trial," and which affirmed that the public has a right to be informed about the administration of justice while also recognizing that prejudicial publicity may result in unfairness to the defendant, the public interest and the judicial process.[43] These groups supported the formulation of voluntary agreements which would respect the presumption of innocence, and the right to be judged in "an atmosphere free from passion, prejudice and sensationalism," and avoid publications which might jeopardize a fair trial.

V

The right to publish is by no means limited to newspapers and periodicals which have regular channels of distribution. So far as the First Amendment is concerned, anyone with a typewriter, or mimeograph machine, or hand

printing press is a publisher who, like all other publishers, has a right to circulate his product. The right to distribute circulars and handbills has been litigated frequently in American courts, and has been broadly vindicated and protected by the United States Supreme Court. In the first of the handbill cases, Lovell v. Griffin,[44] decided in 1938, the Court ruled unconstitutional a municipal ordinance which required the prior written permission of the city manager to distribute "literature of any kind." The suit was brought by a group of Jehovah's Witnesses. The city defended its ordinance as a sanitary measure, and argued that Jehovah's Witnesses were not members of the press. A unanimous Court held that the challenged ordinance was "invalid on its face," since it ordained an absolute prohibition without a permit, unrelated to public order, disorderly conduct or molestation of the inhabitants. It ruled that liberty of the press extends to the distribution of pamphlets and leaflets. Said Chief Justice Hughes: "These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[45] Furthermore, the Court ruled that the ordinance cannot be sustained because it related to distribution rather than publication, since the liberty of circulation is as essential to the freedom of the press as the liberty of publication.

The following year, in a joinder of four different cases, the Court held that the objective of preventing litter in the streets is not sufficient to justify prohibiting the handing out of literature to a willing receiver.[46] The Court noted that streets are the natural and proper places for the dissemination of information and opinion, and that there are other ways to prevent littering the streets, e.g. by punishing the litterer. In any event, said Justice Roberts, "the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution."[47] In other words, the price is too high. But, in the case of purely commercial advertising, distribution on the streets is a matter of legislative judgment.[48]

The right to distribute leaflets without prior restraint was heavily underscored in a decision of the Supreme Court in 1971.[49] An organization of persons residing in an urban neighborhood whose purpose was to stabilize the racial ratio in the area distributed leaflets accusing a real estate broker of "panic peddling," or what is usually referred to as "blockbusting." The leaflets were distributed in a wholly peaceful manner; there was no disruption of traffic; there were no fights or disturbances or other breaches of the peace. The state courts had granted an injunction on the ground that there was an invasion of privacy, and on the further theory that the leaflets were coercive and intimidating in their effect. The Supreme Court disagreed, holding that this was an unconstitutional prior restraint on freedom of speech and press. It noted that it had long been established that peaceful pamphleteering is a form of communication protected by the First Amendment, and

therefore any prior restraint on expression comes to the Court with a heavy presumption against its constitutionality. It concluded that this burden was not met in this case.

Finally, in a 1960 case decided by a 6-3 vote, the Court held unconstitutional an ordinance of the city of Los Angeles which prohibited the distribution of anonymous handbills.[50] The ordinance required that on the cover or face of the handbill there must appear the name and address of the person who printed, wrote, compiled or manufactured it, and of the person who caused it to be distributed. While the state argued that the ordinance was aimed at those responsible for such heinous things as fraud, false advertising, libel or obscenity, it was noted that the ordinance was not limited to such uses. Undoubtedly the identification requirement would have the unfortunate effect of restricting freedom to distribute information, and Justice Black wrote out an eloquent defense of the anonymous publication": "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes."[51]

Justice Black pointed out that in recent cases the Court had ruled that there are times and circumstances when states may not compel members of groups engaged in the dissemination of ideas to be publicly identified, because identification and fear of reprisal might deter perfectly peaceful discussions of matters of public importance.[52] Since the broad Los Angeles ordinance was subject to the same infirmity, it was adjudged to be unconstitutional on its face. On the other hand, the three dissenting Justices protested that the right to freedom of speech does not embrace any freedom of anonymity, and they pointed out that the Court had previously upheld as valid various

identification laws, such as that requiring newspapers possessing second-class mailing privileges to publish the names of the editor, publisher and owner,[53] or the law requiring the identification of lobbyists.[54] They also pointed out that a large majority of the states had laws forbidding the distribution of anonymous materials relating to elections, and thus expressing "the overwhelming public policy of the Nation." They insisted that it wasn't asking very much to require one who exercises the right of free speech to identify himself, for this enhances responsibility. They could find in the record no evidence that the ordinance encroached upon First Amendment rights, and they argued that it would be time enough to strike down an application of the ordinance when and if such restraint is demonstrated.

VI

Unimpeded access to the channels of publicity is an important aspect of the freedom to communicate, and it has rarely been challenged. But in 1961, in the Noerr case,[55] it was, and the result was a very interesting unanimous Supreme Court decision. This litigation was a chapter in the long struggle between the truckers and the railroads for freight business. It involved an action filed by 41 truck operators in Pennsylvania and their trade association against 24 Eastern railroads and their public relations firm, Carl Byoir. The complaint alleged that the defendants had conspired, in violation of the Sherman Act, to conduct a publicity campaign against the truckers to secure the adoption and enforcement of laws which would hurt the truckers, to create an unfavorable atmosphere for the trucking industry, and to impair relationships existing between the truckers and the general public, and their customers. The publicity campaign was described as "vicious, corrupt and fraudulent." In addition, the complaint alleged that the railroads utilized the so-called third-party technique according to which publicity matter circulated in the campaign was made to appear as the spontaneously expressed views of independent persons and civic groups, when, in fact, the material was largely produced by Byoir and paid for by the railroads. There were also specific charges of attempts to influence legislation directly through the publicity campaign. For example, one specific charge was that the railroads succeeded in persuading the Governor of Pennsylvania to veto a Fair Truck Bill which would have permitted truckers to carry heavier loads than were allowed under existing law.

The Supreme Court set aside a holding of the lower federal courts that the railroads had violated the Sherman Act. It is an established rule of law, said Justice Black, "that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws."[56] There can be no violation where the restraint upon competition is the result of valid governmental action, as opposed to private action. "We think it equally clear," Justice Black added, "that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the

executive to take particular action with respect to a law that would produce a restraint or a monopoly."[57] To hold otherwise would substantially impair the power of government to take action regarding trade. Furthermore, Justice Black pointed out that to a very large extent, the whole concept of representative democracy "depends upon the ability of the people to make their wishes known to their representatives."[58] More specifically, what is involved is the right of petition, and since it is one of the freedoms protected by the Bill or Rights, no one should lightly impute to Congress an intention of invading it. The people have a right to inform their representatives of their desires regarding the enactment and enforcement of laws, and it is neither unusual or illegal to seek action on laws which may bring about a disadvantage to competitors. As for the third-party technique, while Justice Black agreed that it was unethical, it did not follow that it was in violation of the Sherman Act, for that Act is concerned with restraints on trade and not with political activity. It follows that the third-party technique is "legally irrelevant."

The Court reached a different conclusion in a 1972 case which involved similar, though by no means identical, facts.[59] This litigation grew out of a contest between competing groups of highway carriers operating in California. The complaint alleged a conspiracy to monopolize trade and commerce in the transportation of goods over the highways in violation of the Clayton Act. It was charged that the defendant group engaged in concerted efforts to institute actions in any state or federal proceedings to resist and defeat applications by their competitors to acquire operating rights. It was alleged that these activities extended to rehearings and reviews or appeals from administrative agencies to the courts. The District Court dismissed the complaint for failure to state a cause of action, but the Court of Appeals and the Supreme Court disagreed.

The Court ruled that under the Noerr holding citizens and groups have the same right to seek to influence the courts and administrative bodies that they have with regard to the legislative branch, since the right of petition must apply to all departments of the government. But there may be instances, Justice Douglas pointed out, where the conspiracy is "a mere sham" to cover a real attempt to interfere directly with the interests of a competitor who is protected by the anti-trust laws. In this case, it was noted, the allegations in the petition were not that the conspirators sought to influence public officials, but that they sought to bar competitors from meaningful access to adjudicatory tribunals by getting involved in proceedings without probable cause and regardless of the merits. While misrepresentation may be condoned in the political arena, it is not immunized when used in the adjudicatory process. Thus if parties are effectively barred from access to the agencies and the courts, an illegal result has been produced through an abuse of administrative and judicial processes.

Citing a well-known case which ruled against the legality of peaceful picketing which was designed to accomplish a purpose unlawful under state law,[60] Justice Douglas argued that it was well settled that "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." Thus if the purpose of the conspirators was to eliminate an applicant as a competitor by denying free and meaningful access to agencies and courts, then a violation of the anti-trust laws may well be established. "If the end result is unlawful," said Justice Douglas, "it matters not that the means used in violation may be lawful."

Since the District Court granted a motion to dismiss the complaint, there was no record of proofs, and therefore the case was remanded to that court for trial. Two concurring Justices, Stewart and Brennan, were apprehensive that the Court was retreating from Noerr, but they concurred in the remand because they thought that the complainants were entitled to try to prove that the real intent of the defendants was not to invoke the processes of the administrative agencies and the courts, but rather to discourage and ultimately to prevent the invocation of those processes. Such an intent would make the conspiracy an attempt to interfere directly with the business relationships of a competitor, and therefore the application of the anti-trust laws would be justified.[61]

VII

Finally, since distribution is essential to publication, and is therefore inherent in the exercise of the right to a free press, it is appropriate to make brief mention of the postal power of the federal government. Unquestionably, the effective distribution of printed material depends in large measure upon use of the Post Office. This poses serious problems, since the government exercises great powers in this area. Upholding the constitutionality of a statute which excluded lottery tickets and circulars from the mails, Justice Field wrote in the leading case on the subject: "In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals."[62] Similarly, the Court has ruled that it is constitutional for Congress to bar from the mails obscene[63] and seditious[64] publications, and to punish those who use the mails to defraud.[65] Similarly, the Court has ruled that Congress may deny the use of the mails to public utility holding companies which have refused to register with a federal agency as a step in a regulatory process.[66] Chief Justice Hughes asserted that "when Congress lays down a valid regulation pertinent to the use of the mails, it may withdraw the privilege of that use from those who disobey."[67] In fact, in the celebrated Debs case,[68] decided in 1895, the Court ruled that the property interest of the government in moving

the mails is so great that even without specific statutory authorization, it may secure an injunction in a federal court against interference with that movement by strikers.

While Congress may bar the use of the mails to those who would use them for socially deleterious purposes, it does not follow, by any means, that so far as the mails are concerned, anything goes. Thus, while the Supreme Court has repeatedly affirmed convictions of persons who put obscene publications in the mail, in violation of the federal obscenity statute, the Court has insisted that a legally acceptable standard of judgment as to what constitutes obscenity must be observed.[69] Furthermore, the Court reserves the right to reject the judgment of the Post Office Department as to what is an obscene publication,[70] and to hold the Postmaster General to the faithful observance of strict procedural standards.[71] Thus, the statute is constitutionally defective if it does not assure prompt judicial review, at the initiative of the government. In addition, the Court has ruled that the Postmaster General has no statutory power to withdraw second-class mailing privileges from a magazine which, while not obscene, was in his opinion "morally improper and not for the public welfare and the public good."[72] Congress did not endow the Postmaster General with such sweeping powers of censorship. On the other hand, in a recent decision a unanimous Court ruled that Congress may authorize any addressee to request the cessation of further mailings to him of any matter he deems "erotically arousing or sexually provocative," on the theory that this aids in the protection of the right of privacy.[73] The Court stressed the fact that the statute left nothing to the judgment of the Postmaster General. But the householder has a right to exclude unwanted mail from his home; anything less would amount to a form of trespass.

One of the most important of the postal decisions was the Lamont case,[74] decided by a unanimous Supreme Court in 1965. Congress enacted a statute in 1962 which provided that before receiving unsealed mail from abroad which the Secretary of the Treasury has determined to be communist political propaganda, the addressee must request such mail in writing as a prerequisite to its delivery. Exceptions were made for mail addressed to governmental agencies and educational institutions. The Court ruled that the statute was unconstitutional because it required an official act, the returning of the reply card, which was a limitation upon the unfettered exercise by the addressee of his First Amendment rights. The Court felt that the obligation to file the cards was almost certain to have a deterrent effect, especially for anyone holding a sensitive position in society whose livelihood depends upon security clearance. Indeed, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as communist propaganda. The statute, Justice Douglas declared, is at war with the "uninhibited, robust, and wide-open"[75] debate and discussion that are contemplated by the First Amendment. Both Justice Douglas, in the opinion of the Court, and Justice Brennan, in a concurring opinion, stressed that the use of the mails is an

essential part of free speech, and that the right to receive publications is a fundamental right essential to make the free speech and press guaranty fully meaningful.

Through history, prior restraint by the Post Office has taken various forms. At one time the Postmaster General had the authority to impound or confiscate matter found to be obscene, fraudulent or an instrument of gambling, but since 1960 he has been limited to seeking temporary restraining orders in the federal courts. In connection with fraud cases the Postmaster General has the power to issue stop-orders which in effect prevent the person against whom the order runs to receive any mail at all; all mail addressed to him must be intercepted, stamped "fraudulent" and returned to the sender; if the identity of the sender is unknown the communication goes to the dead-letter office. Finally, the Postmaster General has some authority over the enjoyment by newspapers and magazines of the second-class mailing privilege, which amounts to an indispensable subsidy because of the law rates. The statute limits the privilege to publications regularly issued at stated intervals which disseminate information of a public character. This alone gives the Postmaster General some discretion in deciding who measures up to the statutory standard.[76] An act adopted by Congress in 1912 provides that all periodicals and newspapers must file and publish certain information regarding officers, ownership and sales, and that reading matter for the publication of which money was accepted must be plainly marked as "advertisement." The Supreme Court promptly upheld the statutory classification of the mail as being based upon "broad principles of public policy."[77]

VIII

The First Amendment guaranty of freedom of the press, now fully applicable to the states through the Due Process Clause of the Fourteenth Amendment, includes a limited number of general propositions having varying degrees of clarity and definiteness. It is well established that this freedom, like all freedoms, is not absolute, and that in certain areas of experience the social interest in having a free press must be balanced against other interests which are also highly prized. Freedom from previous governmental restraint on publication is well established in the law. On the other hand, it is equally well settled that the press is subject to general governmental regulation and taxation measures which do not single out the press for special treatment. The press is subject to the contempt power of the courts in reporting on or discussing judicial proceedings, but only if a clear and present danger to the administration of justice has been created. Excessive pre-trial publicity in the news media may result in setting aside a criminal conviction if the defendant was denied a fair trial as a consequence, but this imposes no direct restraint upon publication, though it may result in granting a new trial. The right to publish extends to all forms of publications, and is not limited to

established newspapers and periodicals, and all who publish have a constitutionally protected right to circulate their product. The right to appeal to the public and to governmental agencies by means of publicity is protected by the right of petition which, in this sense, supplements the right to a free press. In addition, the right to circulate involves the right to have fair access to the facilities of the postal system.

Thus, there are limits to the freedom of the press, but in this field we have worked out a number of accommodations between freedom and permissible restraint. Furthermore, public law is never static, and it may be anticipated that the law will continue to grow and to be adapted to the ever-changing patterns and needs of our society. Finally, for the solution of many of our press problems a large measure of self-restraint is a preferred alternative to governmental restraint. As the press grows in professional competence it may be hoped that the need for legal restraints will be diminished.

FOOTNOTES

[1] Near v. Minnesota, 283 U.S. 697 (1931)

[2] Id. at 707.

[3] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (Justice Brennan).

[4] Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).

[5] Whitney v. California, 274 U.S. 357, 375, 373 (1927) (concurring opinion).

[6] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-2 (1942).

[7] U.S. ex rel. Milwaukee S.D. Publishing Co. v. Burleson, 255 U.S. 407, 414 (1921).

[8] Associated Press v. N.L.R.B., 301 U.S. 103, 132-3 (1937) (Justice Roberts). The decision was 5-4.

[9] Associated Press v. United States, 326 U.S. 1 (1945).

[10] Id. at 20.

[11] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

[12] 283 U.S. 697.

[13] Id. at 722.

[14] New York Times Co. v. United States, 403 U.S. 713 (1971).

[15] Grosjean v. American Press Co., 297 U.S. 233 (1936).

[16] Id. at 249-250.

[17] Id. at 250.

[18] 384 U.S. 214.

[19] United States v. C.I.O., 335 U.S. 106.

[20] Id. at 150, 143.

[21] 385 U.S. 374.

[22] Id. at 387-8.

[23] Act of March 2, 1831, 4 Stat. 487, now 18 U.S.C. § 3691. Cf. Rule 42(2), Federal Rules of Criminal Procedure for U.S. District Courts: "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." The phrase "so near to" has been construed to mean physical proximity. Nye v. United States, 313 U.S. 33, 49 (1941).

[24] Toledo Newspaper Co. v. United States, 247 U.S. 402, 416 (1918).

[25] Id. at 419.

[26] Patterson v. Colorado, 205 U.S. 454 (1907).

[27] Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).

[28] Bridges v. California, 314 U.S. 252, 263 (1941). This was a joinder of two appeals; the other involved a labor leader.

[29] Id. at 270-1.

[30] Id. at 273.

[31] Pennekamp v. Florida, 328 U.S. 331 (1946).

[32] Id. at 370.

[33] Id. at 371-2.

[34] Craig v. Harney, 331 U.S. 367 (1947).

[35] Id. at 374-5, 376.

[36] Id. at 396.

[37] 366 U.S. 717.

[38] Id. at 728.

[39] Rideau v. Louisiana, 373 U.S. 723 (1963).

[40] Beck v. Washington, 369 U.S. 541 (1962). This was a 4-3 decision, the dissenters arguing that the grand jurors had not been selected properly.

[41] Sheppard v. Maxwell, 384 U.S. 333 (1966).

[42] Billie Sol Estes v. Texas, 381 U.S. 532 (1965).

[43] For the full text see 38 L.W. 2532.

[44] 303 U.S. 444.

[45] Id. at 452.

[46] Schneider v. State, 308 U.S. 147 (1939).

[47] Id. at 163.

[48] Valentine v. Chrestensen, 316 U.S. 52 (1942). In Jamison v. Texas, 318 U.S. 413 (1943) the Court refused to treat as a commercial handbill one which advertised a religious book on one side and carried a message on the other. The Court concluded that this was "a clearly religious activity." Id. at 417.

[49] Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). Justice Harlan dissented alone, but only on the technical ground that a temporary injunction was not appealable.

[50] Talley v. California, 362 U.S. 60 (1960).

[51] Id. at 64-65.

[52] Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

[53] Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913).

[54] United States v. Harriss, 347 U.S. 612 (1954).

[55] Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

[56] Id. at 135.

[57] Id. at 136.

[58] Id. at 137.

[59] California Motor Transport Co. v. Trucking Unlimited, 30 L.Ed.2d 642 (1972).

[60] Giboney v. Empire Storage Co., 336 U.S. 490 (1949).

[61] Of peripheral interest to the subject under discussion was the decision in Cammarano v. United States, 358 U.S. 498 (1959), wherein the Court upheld a Treasury Regulation which denied deduction, as an "ordinary and business" expense, of sums of money spent by a taxpayer in furtherance of publicity programs designed to help secure the defeat of certain initiative measures then pending before the voters. The Treasury Regulation permitted no deduction for money spent for lobbying purposes or for the promotion or defeat of legislation. The Court held that the non-discriminatory denial of the deduction was plainly not aimed at the suppression of dangerous ideas, and that so far as the Treasury was concerned, everyone in the community was placed on the same footing. Of course, as Justice Douglas noted in a concurring opinion, deductions are a matter of grace, not right, and he rejected the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the state.

[62] Ex parte Jackson, 96 U.S. 727, 736 (1878). The other leading lottery case was In re Rapier, 143 U.S. 110 (1892).

[63] United States v. Chase, 135 U.S. 255 (1890). For a recent holding to the same effect see United States v. Reidel, 402 U.S. 351 (1971).

[64] U.S. ex rel. Milwaukee S.D. Publishing Co. v. Burleson, 255 U.S. 407 (1921); Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917).

[65] Public Clearing House v. Coyne, 194 U.S. 497 (1904). For a recent case see: Donaldson v. Read Magazine, 333 U.S. 178 (1948). Here Justice Black declared, at p. 191, that recent free speech cases provide not "the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes."

[66] Electric Bond & Share Co. v. S.E.C. 303 U.S. 419 (1938).

[67] Id. at 442.

[68] In re Debs, 158 U.S. 564 (1895).

[69] The leading modern cases are Roth v. United States, 354 U.S. 476 (1957) and Ginzburg v. United States, 383 U.S. 463 (1966).

[70] Manual Enterprises v. Day, 370 U.S. 478 (1962).

[71] Blount v. Rizzi, 400 U.S. 410 (1971).

[72] Hannegan v. Esquire, 327 U.S. 146 (1946).

[73] Rowan v. U.S. Post Office Department, 397 U.S. 728 (1970).

[74] Lamont v. Postmaster General, 381 U.S. 301 (1965).

[75] The phrase is taken from the opinion of the Court in New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[76] In Street & Smith v. Hitchcock, 226 U.S. 53 (1912), the Court held that whether a publication is to be considered a book or periodical is a question of law, but that the courts will not interfere unless the decision of the Postmaster General is clearly wrong.

[77] Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913).

THE RESIDUAL RIGHTS OF REPUTATION AND PRIVACY

by

Donald M. Gillmor

Since the United States Supreme Court decision in New York Times v. Sullivan (1964),[1] the first great constitutional case involving the nation's foremost newspaper, the libel laws have almost been repealed. What remains is the burden of attorney's fees and the nervous energy normally expended in litigating.

Until 1964 libel was not looked upon as a constitutional matter. Instead it fell within that venerable body of common law known as torts and was left to the states to deal with as with any other civil action for damages. Moreover, libel was considered speech outside the pale of First Amendment protection. The late Hugo Black was the only Supreme Court Justice who rejected this proposition and in a 1962 interview with Edmond Cahn he declared all libel laws to be an unconstitutional infringement upon First Amendment freedoms[2] -- a notion quite perplexing to most First Amendment scholars at the time.

The first New York Times decision changed all that and the Supreme Court in effect adopted Justice Black's position, or at least came very close to it. In his opinion for the Court Justice William Brennan wrote:

> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Stopping short of the absolute position of Justice Black, Brennan then fashioned a rule which would be used to measure permissible defamatory falsehood, a rule which would prohibit a public official from recovering damages "unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The decision brought to the fore a minority rule on libel best expressed in what now appears to have been one of the most important libel cases in American history, Coleman v. MacLennan,[3] a 1908 Kansas case. The Kansas Supreme Court rejected the firm common law precedent and majority rule in the United States that anything beyond fair comment and criticism upon undisputed

fact would keep good men from seeking public office and held instead that this form of privilege applied even to untrue statements if made in good faith and without malice. Justice Rousseau Burch, defining malice as bad faith and reckless disregard of the truth, declared:

> A candidate must surrender to public scrutiny so much of his private character as affects his fitness for office . . . The narrow (majority) rule leaves no greater freedom for discussion of matters of the gravest public concern than it does for the discussion of the charater of a private individual.

At least when dealing with what Alexander Meiklejohn would call "the thinking process of the community,"[4] the Kansas court demanded that the broadest preference be given the public debate. And this would become a premise of New York Times v. Sullivan 56 years later.

It would appear that since World War II there has been a wider tolerance in judicial circles for abrasive public speech. Additional states were to adopt the more liberal minority rule of privilege, or some version of it, exempting only imputations of crime or libelous charges that could result in removal from office. Words were usually given an innocent construction where possible, although a welter of qualifications remained. In 1959 the United States Supreme Court, declaring for the first time that state libel law was inapplicable, extended immunity to broadcasters who disseminated libel in the course of honoring their obligations to the equal time provision of the Federal Communications Act.,[5] and to executive and military officers whose libelous publications were part of their official duties.[6] Public officials thus enjoyed an immunity from libel suits that private citizens did not have. New York Times redressed this imbalance while at the same time creating a national standard for the protection of ordinary citizens, publishers included, in libel actions.

The last point deserves emphasis. The new national standard was in effect a federalization of the definition of actual malice. Prior to 1964 most states had their own particular definitions and nationally a crazy-quilt of terms was used to mean actual malice, among them negligence, ill-will, spite, and carelessness. The new standard establishing the outer limit of permissible libel was to be a knowing falsehood or a reckless disregard of truth or falsity.

More significantly the Court in this case seemed to be varying for all time the law of seditious libel, that is a law punishing criticism of government or its functionaries. Harry Kalven, Jr. makes this point in telling language:

> My point is not the tepid one that there should be leeway for criticism of the government. It is rather that

> defamation of the government is an impossible notion for a democracy. In brief, I suggest that the presence or absence in the law of the concept of seditious libel defines the society . . . If . . . it makes seditious libel an offense, it is not a free society no matter what its other characteristics.[7]

Not everyone greeted New York Times with Kalven's enthusiasm. Indeed Justices Black and Douglas, in concurring opinions reflecting their more absolutist position on First Amendment questions, thought malice "an elusive, abstract concept, hard to prove and hard to disprove." Similarly Justice Goldberg rejected qualifications being attached to the citizen's right to criticize official conduct.

Thomas I. Emerson, a preeminent First Amendment scholar, agrees with Goldberg that the Court is willing in New York Times to find instances when the government's interest in not being attacked by the citizen-critic outweighs any interest in freedom of expression.

But Emerson's criticism of the limitations of New York Times goes farther:

> When Justice Brennan faces the issue of whether "calculated falsehood" should be protected from libel action, he rules it is not entitled to protection on the ground that it is "no essential part of any exposition of ideas." This is a relapse to the two-level theory (the notion that certain forms of speech are exempt from First Amendment protection). More importantly, it is inconsistent with basic First Amendment theory. It fails to take into account that false statements, whether intentional or not, perform a significant function in a system of freedom of expression by forcing citizens to defend, justify and rethink their positions. Moreover, Justice Brennan's view disregards another tenet of First Amendment theory -- that it is no part of the government's business to decide for the citizen-critic what is of social value in communication and what is not . . . The superrefined attempts to separate statements of fact from opinions, to winnow truth out of a mass of conflicting evidence (but only a part of the total relevant material), to probe into intents, motives and purposes -- all these do not fit into the dynamics of a system of freedom of expression.[8]

Of course there were those who contended that New York Times went too far and would discourage good men from seeking office. But the Supreme Court

was not finished. Its very next step was to reverse the conviction under a criminal libel statute of a district attorney who had criticized "vacation minded" judges for what he thought was laziness and inefficiency. Where freedom of expression was concerned there could be no distinction between civil and criminal libel laws; both were invalid unless rescued by comments about which there was "a high degree of awareness of their probable falsity."[9]

The Court next went about the business of defining the terms of its New York Times standard. In Rosenblatt v. Baer[10] the question was who is a public official? In retrospect the case is more important for Justice Douglas' intimation in a dissenting opinion that the central issue in these cases should not be who is a public official but whether a public issue is being discussed.

Two cases decided together, one involving a football coach and the other a retired army general, gave the Court an opportunity to deal with a second major question: what would a news medium have to do to demonstrate reckless disregard of the truth? The first case involved a magazine article entitled "The Story of a College Football Fix" in which the old Saturday Evening Post reported a telephone conversation between Wally Butts, athletic director at the University of Georgia, and Paul Bryant, head football coach at the University of Alabama, purportedly constituting a conspiracy between the two to fix a football game. Notes had been taken on the conversation by one Burnett, an insurance salesman of questionable character, who, due to an electronic quirk, had cut into the conversation when he picked up a telephone receiver in a pay station. The article went on to describe the game, the subsequent presentation of Burnett's notes to Butts' superiors, and Butts' resignation.

Butts sued for $5 million compensatory and $5 million punitive damages. The Post tried to use truth as its defense, always a dangerous defense in the absence of substantial evidence; but the evidence here contradicted its version of what had occurred. Expert witnesses supported Butts' contentions upon analysis of Burnett's notes and films of the game. The trial jury returned a verdict of $60,000 in general damages and $3 million in punitive damages. In the meantime the New York Times decision was handed down and the Post sought a new trial under its doctrine. The motion was rejected by the trial judge who held Times inapplicable because Butts was not a public official and there was ample evidence of reckless disregard of the truth in researching the article. The judgment was affirmed by the United States Court of Appeals and moved from there to the United States Supreme Court.

The Court fragmented on the case and by a bare majority voted to uphold the judgment in favor of Butts.[11] Harlan's decision may have been an aberration for in it he is using a reasonable man or prudent publisher standard where the situation involves public figures rather than public officials. In other words

where public figures are concerned the test is "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," rather than the tighter standard of New York Times and Garrison.

Chief Justice Warren voted to apply the New York Times standard of actual malice to both public officials and public figures since he could find no basis in law, logic or First Amendment policy for a differentiation between them, and it is this view which has prevailed. But the case is of continuing interest to journalists because it serves as a reminder that beyond a certain point irresponsible conduct in the collection and presentation of news may still be punishable. Certainly this lesson was lost on publisher Ralph Ginzburg when in 1969 a United States Court of Appeals found against his magazine Fact and awarded Senator Barry Goldwater a $75,000 libel judgment.[12] Using an opinion survey of doubtful validity, the magazine had questioned the sanity of the Senator while he was a presidential candidate. The judgment may have been defective because it applied Harlan's superseded prudent publisher standard, but the United States Supreme Court nevertheless denied certiorari over the strong objections of Black and Douglas.[13] Black and Douglas, of course, were consistent in their adherence to a full protection theory of the First Amendment -- "An unconditional right to say what one pleases about public affairs is what I consider," said Justice Black, "to be the minimum guarantee of the First Amendment." The two justices also expressed their extreme displeasure with the fact that all the damages in this case were punitive.

Butts finally settled for a total of $460,000 while Bryant is said to have settled out of court for $300,000. Ginzburg, a perennial loser in the federal courts, is now in prison for having published and disseminated obscenity, a conviction which seems to reject all theories of free expression.

The case of General Walker did not divide the Court. Edwin Walker was clearly an actor in the tumultuous events surrounding the entry of James Meredith into the student body of the University of Mississippi. An Associated Press report stated that Walker, who was present on the campus, had taken command of the violent crowd and had personally led a charge against federal marshals. It also described Walker as encouraging rioters to use violent means and providing technical advice on how to counteract the effects of tear gas.

Although a private citizen since his resignation from the army, Walker had become a much publicized political activist. There was little evidence presented relating to the preparation of the news dispatch. It was clear, however, that Van Savell, the reporter, was actually present at the events he described and had communicated them almost immediately, under pressure of deadline, to the Associated Press office in Atlanta.

The General sought to collect an estimated $23 million in a chain suit against newspapers and broadcast stations which had carried the AP reports. The case which eventually reached the Supreme Court began in Texas when a trial court awarded Walker $500,000 in general damages and $300,000 in exemplary or punitive damages. The trial judge, finding no actual malice to support the punitive damages, entered a final judgment of $500,000. The Texas Court of Civil Appeals, agreeing that the defense of fair comment did not apply because the press reports constituted "statements of fact," affirmed the judgment of the trial court. The Texas Supreme Court declined to review the case and it went up to the United States Supreme Court.

Certainly Walker was a public figure, said the Court, for he had thrust his personality into the vortex of a raging public controversy. Moreover, "in contrast to the Butts article, the dispatch which concerns us in Walker was news which required immediate dissemination. The Associated Press received the information from a correspondent who was present at the scene of the events and gave every indication of being trustworthy and competent. His dispatches in this instance, with one minor exception, were internally consistent and would not have seemed unreasonable to one familiar with General Walker's prior publicized statements on the underlying controversy. Considering the necessity for rapid dissemination, nothing in this series of events gives the slightest hint of a severe departure from accepted publishing standards." (emphasis added)[14] The Supreme Court thereby concluded that General Walker was not entitled to damages from the Associated Press. It is also clear from Walker that the New York Times standard had been expanded by 1967 to include public figures.

A year later in St. Amant v. Thompson,[15] Justice White in his opinion for the Court repudiated Harlan's reasonable man or prudent publisher test and sought to shed further light on the meaning of reckless disregard. "There must be sufficient evidence," said White, "to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

In a vehement dissent, Justice Fortas spoke for many who were still unable to appreciate the permissiveness of New York Times. "The First Amendment," he contended, "is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open-season. The occupation of public officeholder does not forfeit one's membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. New York Times does not preclude this minimal standard of civilized living."

But the Supreme Court was to move yet farther away from Fortas' ideal. The term "blackmail," for example, when used in characterizing the negotiating position of a real estate developer and spoken in the heated public meeting of city council was not slander, nor was it libel when reported accurately in a newspaper story. In addition, the trial judge's loose definition of malice as "spite, hostility or deliberate intention to harm," was considered by Justice Stewart to be an "error of constitutional magnitude" and a judgment against the Greenbelt (Md.) News Review was reversed.[16]

Similarly, when a primary election candidate was referred to by the Concord (N.H.) Monitor as a "former small-time bootlegger," he sued the newspaper and was awarded a $10,000 judgment which the New Hampshire Supreme Court affirmed. Again the United States Supreme Court reversed.[17]

The Ocala (Fla.) Star Banner may have come closer to the outer limits of permissible comment when it confused a mayor, who was a candidate for the office of county tax assessor, with his brother and charged falsely that he had been indicted for perjury in a civil rights suit. An editor who had been employed by the newspaper for little more than a month and had never heard of the mayor's brother changed the plaintiff's first name when a local reporter phoned in the story. A jury awarded the mayor $22,000 in compensatory damages. But again a precise application of the New York Times rule of knowing falsehood or reckless disregard of the truth had not been made and the judgment was reversed per Justice Stewart.[18]

A deputy chief of detectives sued Time magazine when it implied in a story about a Civil Rights Commission report that the police officer was guilty of brutality. Although the magazine had confused a complainant's testimony with the independent findings of the Commission itself, the Supreme Court ruled, with Justice Stewart again writing the opinion, that in the circumstances of the case the magazine had not engaged in a "falsification" sufficient in itself to sustain a jury finding of "actual malice."

"The author of the Time article," said Justice Stewart, "testified, in substance, that the context of the report of the . . . incident indicated to him that the Commission believed that the incident had occurred as described. He therefore denied that he had falsified the report when he omitted the word 'alleged.' The Time researcher, who had read the newspaper stories about the incident and two reports from a Time reporter in Chicago, as well as the accounts of (the Deputy Chief's) earlier career, had even more reason to suppose that the Commission took the charges to be true. . . . These considerations apply with even greater force to the situation where the alleged libel consists in the claimed misinterpretation of the gist of a lengthy government document. Where the document reported on is so ambiguous as this one was, it is hard to imagine a test of 'truth' that would not put the publisher virtually at the mercy of the unguided discretion of a jury."[19]

Recall now Justice Douglas' suggestion in Rosenblatt v. Baer that the central issue in these cases should not be who is a public official but whether a public issue is the context of the libel. That notion would appear to have come to fruition when a divided Supreme Court upheld a Court of Appeals reversal of a $275,000 District Court judgment in favor of a magazine distributor who had been called a "smut distributor" and a "girlie-book peddler" by a radio station, but was later acquitted of criminal obscenity charges. Ironically Justice Douglas took no part in the case, and Justice Stewart, the author of so many opinions for the Court in this area, surprisingly joined Justices Marshall and Harlan in dissent. Justice Brennan, writing for the Court, was joined by Chief Justice Burger and Justice Blackmun. Justices Black and White concurred in the result.[20]

The most incriminating fact of the case was a telephone call by a police captain to Philadelphia radio station WIP which resulted in the following language being included in a succession of news broadcasts:

> Police confiscated (4,000) obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature . . . .Capt. Ferguson says he believes they have hit the supply of a main distributor of obscene materials in Philadelphia.

WIP's trouble began when a state court acquitted Rosenbloom under an admonition from the trial judge that as a matter of law the nudist magazines in the case were not obscene. In the subsequent libel suit all but $25,000 of Rosenbloom's award was punitive damages.

Justice Brennan's contribution to the escalation of the Times test from public official to public figure to public issue is contained in these portions of his opinion:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is on the event; the public focus in on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety . . . .We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.

And again:

> Thus, the idea that certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion if issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of "public figures" which are not in the area of public or general concern.

Citations in Brennan's opinion suggest that he has been influenced by Thomas Emerson's full protection theory,[21] by Donnelly's proposal for right of reply statutes,[22] and by Jerome Barron's ideas on access to the press.[23] More important, however, and consistent with the New York Times standard of actual malice, Brennan could find no evidence that WIP had in fact entertained serious doubts as to the truth of its reports.

For the future disposition of the New York Times doctrine it may be noteworthy that Chief Justice Burger and Justice Blackmun join Brennan in his opinion for the Court. Justice White concurs reluctantly because he has no trouble defining Rosenbloom as a public figure, but he disapproves Brennan's incursion into the privacy of either public or non-public persons.

Justice Harlan, dissenting, would have preferred a less severe test for private persons seeking damages.[24] But it is Justice Marshall's dissent which raises the abiding questions: What remains of the rights to reputation and to privacy? If it is still possible to win a libel judgment, what must a plaintiff show to succeed? Are there any judicial guidelines to assist one in determining what is and what is not newsworthy in a First Amendment sense?

However speculative, part of an answer must be that the libel laws will and ought to protect deeply felt personal feelings growing out of purely personal matters in which society's interest in not engaged. It is at this point -- the point of recognizably purely personal feelings -- that libel and privacy seem to interconnect and are now being judged, however badly, against the same constitutional standard. But before additional normative judgments are made, it is necessary to look briefly at the legal status of privacy in the United States.

Much of the case law of privacy grew out of a 1903 New York statute which was a legislative response to the dilemma of a young woman who, discovering her portrait on posters advertising flour in stores, warehouses, and

saloons, found that she had no legal recourse.[25] In early cases based on this statute, expropriation of a name or a picture for commercial purposes would almost insure a judgment for the plaintiff. Where news was concerned, however, there was a general recognition that privacy would frequently have to be sacrificed to a broader right of the public to know.

By 1940, 15 states had recognized the right of privacy, some as a result of unusual cases involving, for example, a reformed prostitute, the news photo of a woman jumping to her death from a high building, a woman incorrectly identified as an "exotic red-haired Venus" in a combination advertisement for a traveling burlesque show and whole wheat bread, and other coincidental uses of names, fictionalization, or the use of names and pictures in legitimate news stories.

The defense of newsworthiness was reinforced in a much discussed 1940 court decision which refused the protection of privacy law to a former child prodigy whose life as a practically unknown recluse had been exposed by a writer for New Yorker magazine.[26] If the passage of time would not defeat the defense of newsworthiness, what conditions could be attached to the public interest, where could a line be drawn between legitimate news and maudlin curiosity?

A Missouri court provided an answer in a case brought by a hospital patient who had been photographed against her will and presented to the world as the "starving glutton" by Time magazine. "If there is any right of privacy at all," said the court, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition. . ."[27] Similarly a news picture published 20 months after a child was knocked down by a reckless driver was declared an invasion of privacy when reprinted in the old Saturday Evening Post under the caption, "They Asked To Be Killed," implying carelessness on the part of the child pedestrian. This "false light" representation constituted an invasion of privacy.[28] Legislatures in Florida, Georgia, South Carolina and Wisconsin have passed laws prohibiting the publication of names of rape victims.

But the foregoing cases did not prove to be strong precedents and they may have been superseded in 1967 when for the first time the United States Supreme Court invoked the First Amendment right of free press to defeat a privacy suit. The case originated in 1952 when James Hill, his wife and five children were held hostage in their suburban Philadelphia home by three escaped convicts. The Hills were not harmed, in fact they were treated somewhat courteously by the intruders. A year later, a novel, Desperate Hours, purported to describe the episode, but with the fictionalized addition of violence against the father and a son, and "a verbal sexual insult" against a daughter. The novel led to a play and the play to a promotional picture-story in Life magazine. By this time the Hill family had fled to Connecticut to avoid the public spotlight.

The lawsuit was based on the Life article which reviewed the play as "a heart-stopping account of how a family rose to heroism in a crisis." The play was set in the actual house the Hills had occupied in Philadelphia. Otherwise there was little resemblance between the docile captivity of the family and the sensationalized story line of the play.

New York's privacy statute was cited. The family had involuntarily become subjects of public interest and would not have had a case under the statute had the Life portrayal of their experience been accurate. But it had been seriously deficient in this respect, even though it had presented Hill as a hero.

Hill won a $75,000 verdict in a New York trial court which was reduced in a new trial to a judgment of $30,000 in compensatory damages. The New York Court of Appeals subsequently affirmed the judgment and Time appealed to the United States Supreme Court arguing that the rules pertaining to the standards of newsworthiness had not been measured by guidelines which satisfy the First Amendment. The Court per Justice Brennan agreed applying the New York Times standard of malice -- knowledge of falsity or reckless disregard of whether it was false or not. This was the first time an actual malice test, designed for libel, was used to measure the sanctity of privacy. The verdict for Hill was reversed.[29]

One legal scholar observed at the time that "the logic of New York Times and Hill taken together grants the press some measure of constitutional protection for anything the press thinks is a matter of public interest."[30] What, then, remains of the right of privacy?

In a spirited dissent in which he was joined by Chief Justice Warren and Justice Clark, Justice Fortas again appeared to be the defender of the now residual rights of reputation and privacy.

"I do not believe," he argued, "that whatever is in words, however much of an aggression it may be upon individual rights, is beyond the reach of the law, no matter how heedless of other's rights -- how remote from public purpose, how reckless, irresponsible, and untrue it may be. . . . The greatest solicitude for the First Amendment does not compel us to deny to a State the right to provide a remedy for reckless falsity in writing and publishing an article which irresponsibly and injuriously invades the privacy of a quiet family for no purpose except dramatic interest and commercial appeal."

To be sure the Hill case may not have presented the free press-privacy issue squarely; and though Justice Brennan's rationale may be debatable, damage to privacy in the case may not have been sufficient to overcome the public's right to know, nor was the line between fact and fictionalization as clear as it might have been. But the central question remains: where does privacy stand in our hierarchy of values?

In the most scholarly and comprehensive study of privacy and the press yet to appear[31] and the first since a work by Ernst and Schwartz in 1962,[32] Don R. Pember accords greater weight to the right of the press in an argument congruent with that of Justice Brennan in Hill. "Throughout the years," he notes, "a distinct First Amendment philosophy or flavor developed in the great mass of case law on privacy. Schooled in a tradition which predates our nationhood, judges and justices generally placed freedom of the press above the individual right of privacy." And so, when cases involve truthful news stories, Pember adds, the defense against privacy suits is so large that the remedy has little potency, and with only the slightest hint of reservation, Pember says "this is perhaps the way it should be."

"Which is more important," Pember asks, "the protection of society by a free and unfettered press, or the individual's claim to personal solitude?" Mark well the way the question has been put. One is reminded of how badly free expression fared in the first great post-war Communist conspiracy case when, in a similar equation, speech was weighed as an individual right and set against society's interest in self-preservation.[33]

The answer to Pember's question may be predetermined, for he and some of the court decisions which support his thesis would seem to have ignored Roscoe Pound's admonition that "When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance in our way of putting it."[34]

Balancing, of course, is hazardous at best, and in the case of free press and privacy it may be unnecessary for, as Thomas Emerson observes, "The possibility that the right of privacy will overwhelm the rights of society is so remote that it is hardly cause for alarm. Most of the forces at work press the other way."[35]

Privacy, then, must be examined in its own right, its nature explored and an attempt made to understand its function in relation to the rules of collective life. Guiding definitions might be Brandeis' "most comprehensive of rights and the right most valued by civilized men,"[36] or Bloustein's "social vindication of the human spirit,"[37] or Konvitz's "a kind of space that a man may carry with him, into his bedroom or into the street,"[38] or Paul Freund's "reality of human personality in an age increasingly defaced by anonymity and mass media, mass politics and mass information. . . ."[39]

Pember's book is, of course, much more than a polemic for free press. It compensates for the neglect of press cases in more general studies of privacy by Alan Westin[40] and Arthur Miller.[41] A measure of Pember's task is that of 450 relevant cases out of a total of 600 he examined, 216 involved the mass

media. Even more challenging is the problem of having to deal with the ambiguous legal status given the right of privacy in and since its proposal by Samuel Warren and Louis Brandeis in their 1890 Harvard Law Review article.[42] By scrutinizing the Boston newspapers of the 1880s -- a decade of extraordinarily high achievement in American journalism generally, according to Pember -- the author is undoubtedly the first scholar to refute the assumption of rampant yellow journalism upon which Brandeis and Warren based their argument. Yet, if those two young lawyers misrepresented their own environment, they were prescient in their reference to "mechanical devices (which) threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops'."

Pember recognizes also that electronic snooping by both government and private corporations will present a greater problem for society than will its press. And where the mass media are concerned, Pember envisions retraction laws which will apply both to libel and nondefamatory privacy cases. And he speculates on what may be the relationship of privacy to access if access continues to evolve as an implied First Amendment right.

But the intrinsic nature of privacy is not reached in Pember's study; nor is it well defined in those states which have given it judicial notice or common law or statutory protection.[43] Where the press is concerned, courts have been permissive in defining newsworthiness and have generally assumed a public interest. On occasion they have considered the details of private life paramount, for example photographs of a woman in a county fair fun house with her skirt blown above her head,[44] and a picture of a deformed newborn child.[45] Although not a press case, a federal court had no hesitation in ruling in favor of a woman who upon entering a police station to complain of an assault was asked to undress and was photographed in the nude; her picture was later circulated among police officers.[46] But these seem to be exceptional cases.

We are left with Justice Marshall's central question in his Rosenbloom dissent: what remains of the rights to reputation and to privacy? Where is the line to be drawn between a person's innermost feelings of self-respect and the reporter's notion of newsworthiness or the public's interest? The answer is not yet to be found in court opinions. In the meantime, it is my contention that the residual rights of reputation and privacy will be lost in any balancing against broadly defined social rights; the alternative is to view these rights as protected by rules which cut across any opposing rules of the collectivity, in Thomas Emerson's words "a sphere of space that has not been dedicated to public use or control."[47]

FOOTNOTES

1 376 U.S. 245, 11 L.Ed.2d 686, 84 S.Ct. 710.

2 Edmond Cahn, "Justice Black and First Amendment 'Absolutes': A Public Interview," New York University Law Review, 37: 557-558 (1962).

3 78 Kan. 711, 98 P. 281 (1908).

4 Alexander Meiljelohn, Free Speech and Its Relation To Self-Government. New York: Harper, 1948, p. 29.

5 Farmers Educational and Cooperative Union of America v. WDAY Inc., 360 U.S. 525, 3 L.Ed.2d 1407, 79 S.Ct. 1302 (1959).

6 Barr v. Matteo, 360 U.S. 564, 3 L.Ed.2d 1434, 79 S.Ct. 1335 (1959).

7 Harry Kalven, Jr., "The New York Times Case: A Note on the Central Meaning of the First Amendment," Supreme Court Review, 205 (1964).

8 Thomas I. Emerson, The System of Freedom of Expression. New York: Vintage Books, 1970, p. 530.

9 Garrison v. State of Louisiana, 379 U.S. 64, 13 L.Ed.2d 125, 85 S.Ct. 209 (1964).

10 383 U.S. 75, 15 L.Ed.2d 597, 86 S.Ct. 669 (1966).

11 Curtis Publishing Co. v. Butts, 388 U.S. 130, 18L.Ed.2d 1094, 87 S.Ct. 1975 (1967).

12 Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969).

13 Ginzburg v. Goldwater, cert. denied 396 U.S. 1049, 24 L.Ed.2d 695, 90 S.Ct. 701 (1970).

14 Associated Press v. Walker, 388 U.S. 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975 (1967).

15 390 U.S. 727, 20 L.Ed.2d 262, 88 S.Ct. 1323 (1968).

16 Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 26 L.Ed.2d 6, 90 S. Ct. 1537 (1970).

17 Monitor Patriot Co. v. Roy, 401 U.S. 265, 28 L.Ed.2d 35, 91 S.Ct. 621 (1971).

[18] Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 91 S.Ct. 628 (1971).

[19] Time Incorporated v. Pape, 401 U.S. 279, 28 L.Ed.2d 45, 91 S.Ct. 633 (1971).

[20] Rosenbloom v. Metromedia, 403 U.S. 29, 29 L.Ed.2d 296, 91 S.Ct. 1811 (1971).

[21] Emerson, note 8, supra.

[22] Donnelly, "The Right of Reply: An Alternative to an Action for Libel," Virginia Law Review, 34: 867 (1948).

[23] Jerome Barron, "Access to the Press--A New First Amendment Right," Harvard Law Review, 80: 1641 (1967).

[24] The scholarly and often wise opinions of the late Justice Harlan, many of them in dissent in the First Amendment arena, may provide any new conservative majority with a useful point of reference for a modest retreat from the liberal idealism of the Warren Court. More obvious are the key positions now occupied by Justices White and Stewart, swing positions between any new conservative alliance and the carryover liberal minority.

It would appear from both majority and minority opinions in Rosenbloom that crushing punitive damages are out of favor with the Court.

[25] Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902). The New York Privacy statute says in part: A person, firm or corporation that uses for advertising purposes, or fot the purpose of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor, of his or her parent or guardian, is guilty of a misdemeanor.

[26] Sidis v. F-R Publishing Corp., 113 F.2d 806 (1940).

[27] Barber v. Time, 348 Mo. 1199 (1942).

[28] Leverton v. Curtis Pub. Co., 97 F.Supp. 181, aff'd 192 F.2d 974 (1951).

[29] Time, Inc. v. Hill, 385 U.S. 374, 17 L.Ed.2d 456, 87 S.Ct. 534 (1967).

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[35] Emerson, The System of Freedom of Expression, op. cit., p. 550.

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[38] Milton Konvitz, "Privacy and the Law: A Philosophical Prelude," Law and Contemporary Problems, 31: 272, 279-280 (1966).

[39] Paul Freund, The Supreme Court of the United States. New York: Meridian, 1961 p. 182.

[40] Alan Westin, Privacy and Freedom. New York: Atheneum, 1968.

[41] Arthur Miller, The Assault on Privacy. Ann Arbor: University of Michigan Press, 1971.

[42] Samuel D. Warren and Louis D. Brandeis, "The Right of Privacy," Harvard Law Review, 4: 193 (December 1890).

[43] Wisconsin is among a very few states (Rhode Island, Texas and Nebraska) which give no protection to privacy.

[44] Daily Times Democrat v. Graham, 162 So.2d 474 (1962).

[45] Bazemore v. Savannah Hospital, 171 Ga. 257 (1930).

[46] York v. Story, 324 F.2d 450 (1963), cert. denied 376 U.S. 939 (1964).

[47] Emerson, The System of Freedom of Expression, op. cit., p. 562.

PRESS FREEDOM: CAN IT SURVIVE IN THE SEVENTIES?

by

Arville Schaleben

Fellow citizens, the question is

"Press Freedom - Can It Survive the Seventies?"

When we say press freedom, as practiced in America, we really mean freedom, period. In the development of Western man since the Magna Carta at Runnymede in 1215 -- in the development of individual freedom, your freedom to be a lawyer or an educator or a businessman, my freedom to be a journalist, a speaker -- in the development of our republic -- nothing looms larger than your right and my right to write, to speak, to listen, to assemble.

The theme of this conference -- "The Future of Press Freedom: Journalism and Law Perspectives" -- connotes jeopardy: it suggests concern.

Well there might be. The University of Wisconsin Journalism Extension and The Johnson Foundation sensed it. So do you. So do I, to the point of profound worry about it in the seventies and actual alarm for the eighties.

Why? Consider these generalities, capsulated:

1. Neglect by the nation's best minds of responsibilities toward general citizenship and therefore toward preserving individual freedom.

2. Prolonged abuse by public officials of democracy's basic precept that government derives from and exists for the citizen. The republic cannot survive, it seems to me, without dominant devotion to that precept by its opinion leaders. Alas, how things have changed since we were younger! To many of us nowadays government is growingly "they," which comfortably excuses us from the government's more atrocious decisions and conduct. What's happened to the greatness and the glory of "We, the people," to government by the people?

I fear that our democracy cannot forever sustain itself with elected or appointed public officials who soon disdain the "public" and emphasize the "official" of their governmental occupations. Washington's and Milwaukee's current administrations demonstrate my point. Classifying or concealing information betrays citizen confidence and trust. It makes the government "they."

3. Mass citizen indifference to restraints being put upon the right to know, that is, on freedom of the press, to the right of fair and fast trial, to the right of movement and to the right of dissent and to the right to be private. Don't expect the slumbering masses to resist the restraints, not before their opinion leaders do.

4. The changing character, for the worse, of print media ownership. The increasing importance of the electronic media that is licensed broadcasters and CATV operators, in the spectrum of mass communications. All of us know that broadcasting's built-in complexities require regulation. Regulation is just a long way to spell rules. Rules imply control. Control accepts licensing. Licensing derives from government. End result: Government in charge.

If that choppy recital seems far fetched, take a look at Boston. The Herald Traveler owned WHDH television. The government took away WHDH's license. All agree that the Herald-Traveler now seems to be on its last leg. Sad result: Farewell, old Traveler, may you rest in peace.

Of course, it was not planned that way. Circumstances, not conspiracy, caused the injury to the Boston public's ability to know. It was in the nature of things. Television is cheap to operate and asks its audience for little mental effort. Looking and/or listening is effortless. Reading takes brain energy. The tube is empty, literally but, of course, not actually, and it readily accommodates the empty mind. So WHDH had the audience and the profits, and it made more money than the Herald-Traveler lost. But the licensor, that is the government, the FCC, made an honest judgment that the Herald-Traveler ownership had transgressed the rules of proper practice. Out went the WHDH license, and out go the lights at the Herald-Traveler.

And no. 5 among my generalities of why we need be concerned about press freedom's survival: Attacks on the principal practitioners of press freedom, by this administration and by its emulators not just in government but in business, in the professions, in education, in service clubs -- everywhere, it sometimes seems to those of us in the business. The nature of mass communications -- its demands to be quick, to report the news while the facts may still be developing and fuzzy, to try to cover almost everything -- those requirements mean errors every edition and therefore make the media vulnerable to attack. Their competition for the dollar needed to survive; for the reader/listener's attention, for the exercise of power that means prestige that means profit that means power -- in short, the faults of the mechanism may generate its own self-destruction, just as freedom itself may be strangled by freedom.

Yes, the faults of the press are the faults of free men. Responsible opinion leaders need to tolerate the press' built-in faults, for the free press is indispensable to democracy.

You all know there are many facets to these five capsulated points. Perhaps you will want to develop them in our discussion periods. Certainly my brief mention of print media control -- its quality, or lack of quality -- deserves deeper attention. But for my part, I tend to believe that the cardinal point in considering whether press freedom is withering, and indeed whether it can survive our decade, is the lack of citizen responsibility toward preserving our freedoms.

Some scholars dispute where the fault lies. In fact, Robert Cirino has authored a new study entitled, "Don't Blame the People -- How the News Media Use Bias, Distortion, and Censorship to Manipulate Public Opinion."

He says it's the press' own fault.

One of his chapters is called "A Catalog of Hidden Bias." That chapter's subtitles give you the idea. They are:

"Bias in the News Source"

"Bias Through Selection of News"

"Bias Through Omission of News"

"The Art of Interviewing"

(Here Mr. Cirino quotes Ben Bagdikian's study of the use of interviews by U.S. News and World Report. Mr. Bagdikian found: "In the first six months of 1958 . . . there were verbatim interviews with 27 representatives of large corporations. There were almost none from labor or the opposite wing of domestic economics. On Auto workers demands there were textual reprints from heads of the car manufacturing corporations, none from the union. On prices, wages, and profits there were full texts from Harlow Curtice, head of General Motors; Roger M. Blough, Chairman of U.S. Steel; and Benjamin F. Fairless, President of the American Iron and Steel Institute; but none from the opposite side.)"

Other subtitles in that same chapter are:

"Bias Through Placement"

"Bias Through 'Coincidental' Placement"

"Bias in the Headlines"

"Bias in Words"

"Bias in News Images"

"Bias in Photograph Selection"

"Bias in Captions"

"The Use of Editorial to Distort Facts"

"The Hidden Editorials"

Mr. Cirino's claims have antecedents going back for decades, and he makes that painfully plain. For example, the late Henry Luce of Time and Life in 1947 hired a distinguished bevy of scholars and deans to examine the press in America. They found free speech to be in danger, not so much from the government as from those who controlled access to the media. Here's a paragraph:

"Protection against government is now not enough to guarantee that a man who has something to say shall have a chance to say it. The owners and managers of the press determine which person, which facts, which version of the facts, and which ideas shall reach the public."

I say, true enough, but who would you prefer do the selecting? The district attorney? George Meany? Mr. Throttlebottom? John Wayne? Harold S. Geneen? Derek Bok? Angela Davis?

"The great volume of news, the way it must be processed, and the public's need to make some kind of order out of the chaos of news events make bias inevitable," Cirino concludes, and I concur.

"Objectivity and fairness are impossible," Mr. Cirino continues, and I concur only in part. "Declarations of objectivity and fairness serve only as public relations devices to hide from Americans the great advantage of controlling the decisions and tools which create bias . . . Those who use the techniques of implanting bias in the news cannot be condemned. Rather it is the communications system that is at fault, allowing the power to create biased news to be monopolized by those who advocate similar viewpoints and priorities . . . Millions of citizens are left with few choices -- they may silently conform, or drop out, or demonstrate, or riot."

Those kinds of words gnaw at me as a journalist. They hit home, because there is something to what the man says. I take consolation, however, in knowing that while journalism's faults are both many and ancient, the free press equally long has been evaluated and praised and feared as both a barrier against government encroachment on individual rights and as an indispensable force in the accomplishing of democratic government.

Justice Louis Brandeis said:

"The function of the press is very high. It is almost holy. It ought to serve as a forum for the people."

Albert Camus said:

"A free press can, of course, be good or bad, but most certainly without freedom it will never by anything but bad . . . freedom is nothing else but a chance to be better, whereas enslavement is a certainty of the worse."

Barney Kilgore of the Wall Street Journal said:

"The fish market wraps fish in paper. We wrap news in paper. The content is what counts, not the wrapper."

And my hometown commentator of the 1940's, H.V. Kaltenborn, speaking out of an opinion of journalism education now happily outdated -- I hope -- said:

"In college circles, journalism is thought of as a possible stepping stone to literature, or political life, not as a career that presents good opportunities in and of itself. If these colleges will encourage young people to look toward journalism, there will be more well-equipped recruits whom we can trust with the task of guiding the king of America -- public opinion."

Public opinion -- "the pressure of public opinion; it's like the atmosphere; you can't see it, but all the same, it is sixteen pounds to the square inch."

"Sixteen pounds to the square inch," as James Russell Lowell noted. Yes, but there's a rub. It's sixteen pounds to the square inch, on Washington, and Madison, and Racine only if the citizen -- and especially the educated citizen -- takes the time to apply it. Therein I sense the current danger of failure in America's noble experiment in self-government, free speech, and free press.

I plead with the best minds of the campuses, and of professional people everywhere of all varieties, and of big business, and of labor leaders, and of preachers, and farmers and housewives and tradesmen and admirals and generals and poets and signers -- I plead with all of you -- recognize and accept a responsibility toward your general citizenship.

Your general citizenship in the U.S.A. demands that you know what's going on in your local, state, and national government and in the capitals of other lands, not for the sake of those of us who live by selling news and newspapers, but for the sake of democracy's survival. Use free press while we have it, or we won't have it many decades more.

We must have better public opinion applied to government decisions. I am appalled by the ignorance about vital questions of the day, in the fine minds I admire most. Not that I fully accept Rabelais, who wrote, "The thing is written. It is true." Not that at all. Just the opposite. Merely because it is written does not make it true. So all the more reason that citizens acquire knowledge that permits them to challenge, with their own information, what is written, and then make a judgment about it.

I am constantly meeting doctors, engineers, scientists, yes, educators, who are so engrossed in their own narrow subject that they have no significant judgment, and thus apply no public opinion pressure on our officials, on the pressing developments and problems of the day. Perhaps they read a bit of the news, but do they contemplate it? Do they try to think what's behind the events, even if for the moment the event is of small personal consequence to them as individuals?

You place too great a responsibility on the press, upon the communicator, when you who have the brains to know better, accept without challenge the journalist's selection of current information and his judgment of its importance to our society.

Consider a few of the big stories of the last several years. Are you willing to leave their implications, or the consequences of their sequels, to the news flow gatekeeper -- the telegraph news editor or to a city editor or a managing editor, no matter how sincere that editor or his newspaper is in making quick judgments about what fills his columns?

Consider the implications on everyone of us and upon the earth and upon space itself of a few big stories.

- 1968 -

President Johnson won't seek reelection.

The presidential election campaign.

Czechoslovakia occupied by Russia.

Heart transplant operations.

- 1969 -

Man on the moon.

For better or for worse, great decisions by the United States Supreme Court.

Student unrest.

Growing trouble in the Middle East.

- 1970 -

The shooting at Kent State and Jackson State

The spread of the Vietnam war into Cambodia, and the managing and censorship of war news.

Terrorism spread across the U.S.

Trouble in the U.S. economy -- recession and inflations.

Airliner hijackings and terrorist kidnappings in Canada.

- 1971 -

Red China joins United Nations, ping pong, Nixon plans visit.

The wage-price freeze.

The Pentagon papers.

School bussing.

How would you have liked to try evaluating those stories and selecting the information about them while they were developing?

And now, the environment story -- realization, at last, that man is trapped on this earth and that man himself is swiftly making earth intolerable for man; sheer fear over air and water pollution and the environment -- "don't smoke in my air and I won't spit in your water." An enormous question so ignored, except in writing and conversation largely confined to themselves, by scientists and knowledgeable government people that not Richard Nixon nor Hubert Humphrey nor George Wallace raised it in the 1968 campaign. As a matter of fact, they aren't paying much attention to ecology even now. It's more profitable at the polls to flay the press as antis and alarmists.

Call it self-adulation, but I believe the press has a much better record. in its responsibility to society, than the behavioral scientists, the natural scientists, the educational administrators and the researchers and executives in the big corporations. And certainly better than an administration which tells its own citizens that Henry Kissinger is at Camp David when actually he is in Moscow.

Many of the newspapers have had national resources reporters for decades. Many a newspaper has won public service prizes for its campaigns against air and water pollution, against waste and against filth, not alone just in the slums but also in our decaying metropolises and in our crumbling countrysides.

Nor is it only ecology that has suffered from "best brains" neglect, to the point where we may not be able to arrest its mortal progression. I met at Arden House on the Hudson several years ago with a group of the nation's top behavioral scientists who were wondering how to reduce their gobbledygook to understandable language. In the conversations, one of the eminent scholars remarked that he had published a paper in the late 1940's, accurately describing the circumstance in race relations that subsequently lead to Selma, Newark, to Detroit, to Milwaukee. I asked him whether he did not feel those tragic events might have been lessened had he shared his astute foresight through mass communication with the American public and the government.

His citizenship duties had not occurred to him. Wrapped in the scientist's false feeling that that would have been self-serving -- self-serving! - he said the press should have sought out his opinions. Now I claim that's asking too much of the newspaper staffs around the country, to be specialists in all fields of knowledge. I believe the specialist has a citizen responsibility to seek out the mass communicator. He must exert leadership on decisions that might be in a developing stage. It's too late for the knowledgeable man to tell what he knows, to those among us less informed, when we already have made the final decision.

I know a university with a budget of over 250 million dollars. About one million dollars of that is spent for publication and for information services, only after heavy editing by the faculty person or department involved, to avoid offending scholarly niceties. Nonsense. Educators are in the public domain. It's time, I feel, to yield some of their comfortable ivy reputations so all of us can save this democracy. Freedom comes from fighting for it. If I win a bit of freedom for myself, I win it, too, for my neighbor.

I believe that university administrators must allot a bigger per cent of budget and leadership responsibility to get their knowledgeable faculty out from behind the ivy, sounding off as needed even though they run the risk of being counted wrong by later events, just as the newspaper reporter and the editorialist report and interpret difficult affairs, well knowing that the morrow may make him a fool for the day.

If the superior citizen does not speak out, who will? The television viewer? Walter Cronkite wrote in Signature magazine:

"Of the television audience, a number we cannot begin to estimate -- tens, or hundreds of thousands, millions, perhaps -- seldom read a newspaper or a news magazine, and never read a journal of opinion."

A study at Harvard tells us that half of America's adults probably lack the literacy required to read such basic items as newspapers and driving manuals. They are "functionally illiterate."

Richard Tobin of Saturday Review commented:

"Much of the essential reading required in a democracy (has to be) at least on the 10th to 11th grade level, but, the Harvard study found that an astonishing number of adults have not even kept up with 4th or 5th grade reading skills and are, therefore, to all intents and purposes, unable to read or write and absorb information from print."

Mr. Tobin added:

"Since democracy is the most complex, the most advanced, the most sophisticated of political ideas, the system requires a large and prosperous middle class, and it asks of that great middle class a certain minimum literacy. It is little wonder that academic freedom and free speech have in recent years eroded occasionally to a sort of fascist emotionalism, without over much reaction to it on the part of the average American.

"In this soil, dictatorships of left or right are seeded and grown to harvest, sometimes so quickly that it is all over before the people know what happened."

That possibility is all too real. Too many people don't give a damn these days, so at all levels of government public officials are giving the newsman a kick in the rump and ignoring the public's right to know.

There is not the slightest doubt in my mind: The people themselves are going to have to assume some of the responsibility to learn about news. For news is the glue that binds government to citizen, and citizen to government, and citizen to citizen with trust in his credibility even though he is a stranger except for his Americanism.

H.G. Wells, the historian, wrote that " . . . the cause of the decline and the fall of the Roman empire lay in the fact that there were no newspapers in that day. Because there were no newspapers, there was no way by which the dwellers in the far-flung nation and the empire could find what was going on at the center."

Journalism's own great philosopher and thinker, Walter Lippmann, said, "A free press is not a privilege but an organic necessity. Without criticism and reliable and intelligent reporting, the government cannot govern. For there is no adequate way in which it could keep itself well informed about what the people of the country are thinking and doing and wanting."

It isn't only the common citizen who is dependent upon the government for the transfer of information. It is the departments within governments.

In Milwaukee the seats of municipal and county government are about a mile apart. Since they govern approximately the same area, many legislative questions are before them simultaneously. For example, the Milwaukee common council was considering one method of waste disposal and the county government another. Daily, officials of both of those governments dashed for the Milwaukee Journal, for only there could they learn what was happening at the other seat of government. Had the officials had to wait for the official reports, the decision making processes would have gone forward without the slightest relationship to what was happening at city hall or at the county seat.

This dependence upon the Fourth Estate's fast transmission of the written word is even more urgent in the relationship of cities to their state governments of their federal government, or of states among states, or of states to Washington, D.C.

Let's ask ourselves -- is the free press really up to its powerful and exalted place? Does it measure up to being, as it is, the only private enterprise specifically provided for, and protected by, the American constitution itself?

Let me give you a measurement I heard with my own ears, in Honolulu in 1970. But I warn you don't swallot it whole! The distinguished speaker said:

"I have not the least doubt that the United States has the most self-demanding, least self-satisfied, most ingenious, least inhibited, best informed, least controlled, most professional, finest journalistic complex in the entire world."

Who said that? Spiro Agnew. So you don't have to believe it. He didn't but I do, mostly.

With all its faults, the American press on balance probably really is the best the world has known. It is not hampered by gentlemen's agreements, as it is in England, nor is it an arm of the government, as it is in Russia, nor is it heavily the captive of political parties, as in Denmark.

Nevertheless, the American press suffers, in the mass mind, from being part of the establishment, and it certainly is, and right now there is widespread revolt against the so-called establishment. Pollster Louis Harris finds that the public feels the establishment "has sold the people short -- and they won't take that lying down."

Harris told the American Newspaper Publishers last convention that a majority of the American people "think America has become a worse place to live compared to what they imagined it was 10 years ago."

The fact that the public thinking may be muddled doesn't help, really. The difficult fact, as Mr. Harris reported it, was that compared with six years ago the "confidence in the leadership of American institutions has fallen off a barnyard wide."

So, as an institution, the press is hurting, despite the fact that it is an improvide product in these specific ways, as recorded by Editor John S. Knight:

"1. Responsibility: Newspapers have fewer involvements and conflicts of interest than the press of 50 years ago, when publishers usually followed a straight party line.

"2. Freedom of the press: This precious and constitutionally guaranteed privilege has never been as vigorously and universally defended as it is today.

"3. Independence: Today's newspapers are economically sound and thus uncontrolled by special interests as was the case in former years when railroads, copper interests, and banks dictated policy.

"4. Partisanship: Few newspapers are party organs or beholden to political interests as at one time.

"5. Sincerity, truthfulness, accuracy, and fair play: The performance record is commendable but will always remain imperfect in the eyes of critical readers. The expanded use of readers' opinions, whether in commendation or disagreement, has improved the art of communication."

The equally distinguished editor, Nelson Poynter of the St. Petersburg Times and of Congressional Quarterly, carried forward the same thesis in addressing Sigma Delta Chi's national convention.

"It is tempting to point with pride and congratulate ourselves because our press is better than ever," Mr. Poynter said. "But in 1970 this won't do. Various philosophic and technological changes have made this the most turbulent of any century. The velocity of change will continue to increase, especially in the field of communications.

"Inevitably, the authority of all institutions has been challenged during this revolutionary era. Empires and monarchies have fallen. Local, state, and federal governments have changed or been overthrown. Our own economic system -- which had tolerated poverty, child labor, the sweat shop, and the tenant farmer -- had to become more responsive to benefit more people. And all change begets change.

"No wonder our educational institutions from kindergarten to graduate school are in turmoil. Every profession -- medicine, law, science, and even mathematics -- is under scrutiny. On a recent Sunday young Italians booed the Pope at the Vatican. The infallibility and even the authority of Pope, teacher, lawyer, doctor, and editor are questioned by the many who are confident we can have better lives, better cities, a better country, and a better world.

"Vice President Agnew's calculated assaults on the press have not disturbed me. But the widespread acceptance of his alliterations at face value must goad our determination to do a better job in all areas. A slick public relations campaign cannot cure our problem. Like the cleric and the educator, we deal in ideas and dreams. Our readers have their own minds, which, like ours, have fixations and rigidities, superstitutions and prejudices."

One of the public's fixations is that you can't believe what you read in the newspapers -- or now to an almost equal extent, what you hear on the air. The public seems growingly to see the Press as bad news, rather than as the messenger bearing bad news. If the administration shades the truth, or totally fractures it, as is common these days, it's The Journal monopoly. If the weatherman predicts wrongly, as he does just shy of half the time, it's The Journal you can't believe.

And all the time, we have public figures egging on the public in its search for a scapegoat, and what's handier than the newspaper?

Yes, as I said at the onset, the American press is endangered -- seriously endangered in some cities -- by self-seeking ownerships, by unbalanced and heedless attacks without regard to the consequences by politicians like Mr. Agnew, by government and other important people undermining its credibility, and by the sheer difficulty of trying to report each days' enormous complexities as their by-the-hour changes outstrip the citizen's ability to keep abreast.

Yes, I am disturbed that some part of America's mass communication machinery is falling into hands of wealth outside the field of mass communications. We have more and more fortunes being applied to newspaper or broadcast ownership for the primary purpose of making a profit or effecting a special interest. They tend to ignore the precept that at times journalism demands that ownership risk perishing in order to preserve its First Amendment commitment. When you are under attack from all directions, as it seems, it is easier to seek shelter than to brave the storm. However, ownership in general remains good. The other factors are more dangerous to freedom and to freedom of the press. I am not despairing, but the fact is, the days are dark in many ways. Often we are asked, "Why print so much bad news?"

We answer: Our business is to print news. We attempt to analyze and interpret news as best we can. We express opinions in our editorials; we offer our own or buy opinion columns by national commentators.

But we do not make the news. Because we print stories about riots, dope, or dissident young people by no means indicates that we approve of them. Yet, many deeply concerned readers resent this use of our space, and they are attacking our prestige by insisting that we are responsible for these conditions.

Recognizing the dark days, we also recognize that consequences be damned, our most important task is to keep you informed and to hold fast to the truth insofar as mortal man can determine it.

"What is truth?" Pontius Pilate asked when judging Jesus.

We can't waive off the judgment as Pilate did. We accept our responsibility in society.

What is the truth in Vietnam? A general says we have secured South Vietnam. We print that. A congressman says our remaining forces are in danger of being overrun. We print that. The reader who believes the congressman, says you can't believe the newspapers when he reads what the general says. The reader who believes the general, reads what the congressman says and decides he can't believe his paper either!

But the newsman keeps on trying, though the search is sometimes unpleasant. We also search out and report the constructive, the good, the enlightening and the happy.

What we ask our best readers to realize is that we are reporting situations, good or bad, only as they are at the moment we go to press -- a fleeting moment, often but a fleeting truth. Few eternal verities issue from government, campus, or common man himself. Thus those of us lucky enough to have risen an inch above the common cut owe it to one another to practice a verity uttered by Frank Moore Colby, who said:

"Every man ought to be inquisitive, through every hour of his great adventures, down to the day when he shall no longer cast a shadow in the sun. For if he dies without a question in his heart, what excuse is there for his continuance?"

Colby also said: "Were it not for the presence of the unwashed and the half educated, the formless, queer, and incomplete, the unreasonable and absurd, the infinite shapes of the delightful human tadpole, the horizon would not wear so wide a grin."

And that reminds me that Carlyle said, "The greatest fault is to be conscious of none."

Believe me, the press is conscious of its faults. We make annoying little errors, we misspell names, we take things out of context. We overemphasize conflict. We have biases and predilections. We know only a little of what we ought to know. We're spiteful -- ah, what the heck we're human beings.

But I submit that our ethics are as good as doctors, our morals the peer of the choir singer's, our business practices as clean as a chain store's.

We laugh. We cry. We try. In fact, we try harder. We try harder because we know our best is barely good enough. We try harder because we know that what we do affects not just our immediate company or family or friends, but also those 200 million other remarkably warm and creative people called Americans.

Now let's take a look at the accounting office. I concede a correlation between how ethical and virtuous a newspaper is and its business office. You do a better job of standing off public or advertiser pressure when you are not vulnerable in the dollar department.

Well. contrary to what you may think, and to what some publishers moan, the economic state of the press is just fine.

I participated a year ago in a broadcast with Jon G. Udell of the University of Wisconsin School of Business. He had just completed an economic study of the daily newspaper business for the American Newspaper Publishers Association Foundation. He made me feel pretty good.

Dr. Udell surprised me, too. I hadn't known how big we are. Would you believe that the newspaper business is tenth among all U.S. industries in total value of shipments?

The value of the automobile business represents 1.82 percent of the nation's total industrial activity. Newspapers represent 1.53 percent. All meat products represent 1.52 percent, drugs and medicines 1.48 percent, lumber .91 percent, television sets .33 percent.

The daily newspaper business employs 370 thousand Americans. Tens of thousands of additional persons produce newsprint, printing presses, computers, and other products.

Between 1947 and 1970 newspaper employment grew from 248 thousand to 373 thousand, a gain of 50 percent. That compares with 37 1/2 percent growth of total employment in the United States.

Thirty percent of America's advertising dollars go to newspapers. Television gets 18 percent. And so on.

Best of all, the daily circulation of U.S. newspapers exceeded 62 million in 1969. And newspaper capital expenditures have exceeded 100 million dollars every year since 1955.

So, newspapers are healthy in cash and circulation. The question is not whether newspapers can survive the seventies as a business. They certainly can. The fast written word is an essential product, for business no less than citizenship. It need only make some simple modifications of present practices to adjust to the economic competition of its upstart electronic cousin. The question is, can freedom of the press survive, not for the publisher and broadcast owner but for the sovereign people?

I guess we'll be all right in America for quite a while if we pay good attention to education and communication. Education, communication -- are they not one and the same? I am hoping that education and its product, the educated man, will take a more assertive role in decision making. If not, heaven help the republic. I am hoping that the educated man will understand that with all its faults, mass communication is his source of individual freedom. Free speech, freedom of the press-let's keep them ours, not theirs.

As refinements in thought and feeling and broader knowledge and distant vistas become closer to more of us, we are compelled toward complexities in citizenship. The complexities are difficult. Only information freely communicated can reduce them. I plead with everyone of intelligence to grasp them as a duty to America.

Talk, thought, idea, words, knowledge, understanding -- in our society of free men we cannot afford to let each stand alone or in association with fewer than all the others. Education's product and the communicator's audience -- progress in our republic depends on them.

Yes, it is easier to talk or to listen than to read, but we cannot overemphasize the essential importance of the written word -- that eternal and infinitely creative force shaped from man's supreme achievement, the alphabet.

The five senses -- sight, sound, hearing, feeling,taste -- these and only these rival the alphabet and words in their intimate effect on man.

Today we know better what spoken and written words do to the receiver. We move spoken words around the world faster than sound. We read faster than we hear or see -- and that's very important in the fact of the knowledge explosion.

(A Filipino millionaire's daughter, at boarding school in Wisconsin, had 100 percent comprehension at 20,000 words a minute and, incredibly, in a final test at St. Clara Academy, she hit 53,000 words a minute reading Frank Mott's heavy book entitled The Responsibility of the Newspaper Reader. In a kind of an outing, she read "Scarlet Letter" in 20 minutes. The fastest broadcasters hit 600 WPM. Normal broadcast speed is about 250 words a minute.)

The Associated Press' new super speed wire transmits news at 1,050 words a minute. The saying, "It's a small world, " was figurative when I was in high school, at the dawn of broadcasting and at aviation's youth. Now, for words in sight and sound, it's a small world literally.

Time and distance have crumbled as obstacles to communicating. Yet, to this day, when sophisticated hardware hurled into the heavens links all parts of the world instantaneously to sound and pictures, thought and truth remains dependent for quality and usefulness upon the free man's devotion to his sovereign duties.

Paraphrasing Albert Camus, let me say, the aim of citizenship, the aim of life itself, can only be to increase the sum of freedom and responsibility to be found in every man and in the world. It cannot, under any circumstances, be to mislead the individual person, nor to reduce or suppress any freedom, even temporarily, save that which jeopardizes the nation's life.

The Romans asked, "Who watches the watchman?" and today we all should ask again and again, "Who edits the editors?"

I plead with you, Let the answer be the well-informed free American citizen.

Believe me. decent newspapers -- and we are decent within the framework of American practices and ethics -- decent newspapers respond to their readers. It used to be said in by-gone days, when five cents bought an ice cream cone, that a man with a quarter's worth of nickels for a pay telephone could influence a newspaper's editorial policy.

The exaggeration is not without basis even today. Editors are edited, to an appreciable degree, by their readers. Some write letters. We read the letters. Some letters make sense. Sometimes they are very angry, especially on both sides of the civil rights issue.

Civil rights letters have dominated the mail for some years. Let me quote one by an authentic American original, fed up with the whole bunch of us. He wrote:

"Dear Sirs: I would suggest that you have the mayor of Milwaukee send all the dumb Pollocks and Swedes, all the Huns, and slimy Greeks, all the stinking Finns and Dirty Froggies, all the Wops, Bohunks, and Dagos, all Lying Limies and Spiks, back to where they came from -- and then follow yourself."

For him perhaps it was a valid view. He signed the letter, "An American Indian."

At the office, we rejoiced in that letter. There was a man not about to let his freedom fade! On, that there were more like him.

And that's what I have to say for now about "Press Freedom -- Can It survive the Seventies?" What do you say?

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Government Curbs on Press Hit

THE MILWAUKEE JOURNAL *Friday, May 26, 1972*

By Edward S. Kerstein
of The Journal Staff

Racine, Wis. – The most important right of a free press is freedom to publish without the publisher's being required to get governmental permission, David Fellman, Vilas professor of political science at the University of Wisconsin, said here Friday.

In addition, Fellman said at a Wingspread symposium, the government "cannot lawfully forbid publication, whatever may follow later on after the publication appears."

"This proposition — that previous governmental restraint on publication is a form of censorship which is forbidden by the constitutional guaranty of a free press — was nailed down in 1931 by the US Supreme Court in the leading case of Near vs. Minnesota," Fellman said.

Other Speakers

Fellman analyzed "Freedom of the Press in American Constitutional Law" at the Symposium on "The Future of Press Freedom: Journalism and Law Perspectives."

Arville O. Schaleben, retired associate editor of The Milwaukee Journal, spoke on "Press Freedom: Can It Survive the Seventies?" and Donald M. Gillmor, professor of journalism and mass communications at the University of Minnesota — Minneapolis, discussed "The Residual Rights of Reputation and Privacy."

The symposium highlighted conflicting views on the status of First Amendment press freedoms. It was sponsored by the Department of Journalism and Mass Communication of the UW—Extension, in co-operation with the Johnson Foundation. James A. Fosdick, department chairman, served as moderator.

Schaleben

Fellman

Schaleben deplored what he called "prolonged abuse by public officials of democracy's basic precept that government derives from and exists for the citizen," and added:

Government Is "They"

"The republic cannot survive, it seems to me, without dominant devotion to that precept by its opinion leaders. Alas, how things have changed since we were younger! To many of us nowadays government is growingly 'they,' which comfortably excuses us from the government's more atrocious decisions and conduct. What's happened to the greatness and the glory of 'We, the people,' to government by the people?"

Schaleben said he feared that US democracy could not forever sustain itself with elected or appointed public officials who soon disdain the "public" and emphasize the "official" of their governmental occupations.

"Washington's and Milwaukee's current administrations demonstrate my point," he said. "Classifying or concealing information betrays citizen confidence and trust. It makes government 'they.' "

Schaleben also made these observations:

Don't expect the slumbering masses to resist, before their opinion leaders do, the restraints being put upon the right to know, the right of fair

and fast trial, the right of movement and the right of dissent and the right to be private.

Government through licensing control of radio and broadcasters and cable television operators is adversely affecting some newspapers.

In Boston, for example, Schaleben said, "The Herald-Traveler owned WHDH television. The government took away WHDH's license (and the newspaper later announced that it would fold). Sad result: Farewell, old Traveler, may you rest in peace."

Faults Conceded

Schaleben conceded that while the news media had its human faults, the American press on balance probably "is the best the world has known."

"It is not hampered by gentlemen's agreement, as it is in England, nor is it an arm of the government, as it is in Russia, nor is it heavily the captive of political parties, as in Denmark," he said.

Gillmor reviewed various court decisions relating to libel and privacy, pointing out that the intrinsic nature of privacy was not well defined in states which have given it judicial notice or common law or statutory protection.

"Where the press is concerned, courts have been permissive in defining newsworthiness and have generally assumed a public interest," said Gillmor. On occasion they have considered the details of private life paramount, for example photographs of a woman in a county fair fun house with her skirt blown above her head, and a picture of a deformed newborn child.

Gillmor said that a court answer was still being awaited to draw the line "between a person's innermost feelings of self-respect and the reporter's notion of newsworthiness or the public interest."

THE MILWAUKEE JOURNAL Saturday, May 27, 1972

Public Held Apathetic on Secret Meetings

By Edward S. Kerstein
of The Journal Staff

Racine, Wis. – Secret meetings by school boards and other local governmental agencies in the state are causing a serious problem in the field of news reporting, Harry Miedema, editor and publisher of the Stoughton Courier-Hub, said Friday at a press freedom symposium at Wingspread.

Miedema said that when his newspaper reported about the secret school board meetings in his community, there did not appear to be too much concern by the public.

"There appears to be too much public apathy about the public's right to know how their school board functions and what actions it has taken in secret meetings," he said.

Cost a Factor

When advised by a group of panel speakers that a newspaper could seek a court order banning school board meetings to be held secretly, Miedema replied:

"Not all newspapers can afford to hire lawyers to represent them in courts. Most newspapers in the state are limited in size and do not have a budget for legal representation."

Speakers who analyzed various press freedom problems at the concluding session of the symposium were Milwaukee Atty. James P. Brody; state Rep. Edward Nager (D-Madison); Berne A. Hoffman, editor of the Racine Journal-Times; Jay G. Sykes, associate professor of mass communication at the University of Wisconsin — Milwaukee, and Gilbert Koenig, editor of the Waukesha Freeman.

Courts Are Open

When advised by some of the participants attending the session that some judges prohibited reporters from writing about certain court proceedings, Brody said that the press had a constitutional right to report on what occurred in the courts as well as in the Legislature.

Brody stressed that libel, one of the big concerns of publishers and editors, could be averted through sound reporting.

"This involves thorough fact and documentary research," said Brody.

He pointed out that while the US Supreme Court had given considerable protection the press, editors must remember that an individual's right to privacy had not been abolished.

Nager Criticizes Press

Nager contended that the most serious problem facing the press was the imposition being made by the government and large corporations. He claimed that a new law against usury by merchants "was played down by most newspapers in Wisconsin."

"I don't think the press generally is doing the job it should be doing in informing the public," said Nager. "At the same time the press ought to pay more attention to the libel laws because you can ruin a man's reputation overnight. Retraction or damages don't properly compensate for the man's loss of reputation through an erroneous story."

Sykes urged the press to engage in more aggressive reporting without making concessions to some public officials or without concern about the abuse it must take.

Hoffman emphasized that the free press-fair trial controversy had not been completely resolved because some judges had prohibited reporters from publishing trial proceedings, while one judge conducted a closed criminal trial on gambling charges.

Koenig complained that on occasion public documents had been withheld from the press.

The symposium was sponsored by the Department of Journalism and Mass Communication of the University of Wisconsin Extension, in co-operation with the Johnson Foundation. Harold L. Nelson, director of the UW School of Journalism and Mass Communication, moderated the afternoon discussion.

Right to Know Apathy Scored at Wingspread Parley

By Linda Winkleman
Journal-Times Staff

ARVILLE SCHALEBEN

DAVID FELLMAN

DONALD GILLMOR

The general public appears to have little or no concern about preserving it's right to know, which leaves the continuing battle for preservation of freedom of the press — with the press.

That seemed to be at least one point of agreement among some 30 journalists, educators and attorneys, mostly from Wisconsin, who gathered Friday at Wingspread to discuss the future of press freedom and who aired often conflicting views about press rights and responsibilities.

The Wingspread program was co-sponsored by the Department of Journalism and Mass Communications of the University of Wisconsin Extension. Its aim was to deal in journalism and law perspectives involved in the future of press freedom.

Public apathy is alarming, indicated Arville Schaleben, retired associate editor of The Milwaukee Journal, who said he tended to believe, "The lack of citizen responsibility toward preserving our freedoms is the cardinal point in hearings and trials?

No clear cut answers to the questions such as these came out of the discussions; but then, no clear cut answers have come from the courts so considering whether press freedom is withering."

He also said it's alarming, for example, that there's "prolonged abuse by public officials of democracy's basic precept that government derives from and exists for the citizen."

—That there are attacks on the "principal practitioners of press freedom, by government, business, professions . . ."

"The faults of the press are the faults of free men. Responsible opinion leaders need to tolerate the press' built-in faults, for the free press is indispensable to democracy."

Jay Sykes, a professor of mass communication at the University of Wisconsin-Milwaukee, said he wasn't sure "freedom of the press as we know it will survive through the 80's.

He suggested it would be gnawed away subtly "piece by piece."

The press has got to be "tough" when it's attacked, he charged. "I think the press must be tough, irascible, and cantankerous. It should stand up to ridicule and be thick-skinned, willing to take abuse."

Whatever current problems the press faces, however, it still has more freedoms than it did at the turn of the century. David Fellman, a Vilas professor of political science, at the University of Wisconsin-Madison, noted and also indicated it's almost impossible to predict what future the press has. "Tell me what history will be in the next 10 years, and then I can tell you what will happen."

He was one of three main speakers, who also included Schalaben and Donald M. Gillmor, journalism and mass communication professor at the University of Minnesota.

A panel including Racine Journal-Times Executive Editor, Verne Hoffman; Sykes; Gilbert Koenig, editor of the Waukesha Freeman; James Brody, Milwaukee attorney who represents newspapers; and State Rep. Edward Nager, D-Madison, sparked an afternoon-long discussion on press freedoms, including the complex and often hazy area of libel, of rights of reputation and privacy.

When is a story or statement libelous? How much does the public have a right to know about a private person — the individual's right vs. society's right? How much, if any, should the press be confined in regard to preliminary far either, participants indicated.

Generally, there has been little federal interference with freedom of the press, except during time of war, with most problems occurring at the state level, it was noted.

Harry Miedema, editor and publisher of the Stoughton Courier-Hub, urged penalties as needed to prevent closed, illegal secret meetings among public officials.

He said there are some 280 small newspapers in the state which can't afford the costs of going to court to compel public bodies to hold open meetings.

The present Wisconsin anti-secrecy laws, he said, provide for no penalties.

When some suggested that stories saying closed secret meetings had been held, often served to open them up, Miedema said that had not worked. "We find the public somewhat indifferent and the School Board would rather face the ridicule from the paper than have it known what they have said, particularly regarding controversial issues."

RACINE JOURNAL-TIMES
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